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88-288

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES

SUPREME COURT

NO.

STEVEN J. DUPUIS, ET AL

Respondents

VERSUS

THOMAS R. BECNEL, ET AL

Petitioners

ON PETITION FOR WRIT OF CERTIORARI AND MANDAMUS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

DOES A POLICY AGAINST PIECEMEAL APPEALS OVERRIDE A POLICY AGAINST PIECEMEAL LITIGATION WHEN A DISTRICT COURT HAS BASED ITS REFUSAL TO ABSTAIN ON OBVIOUSLY ERRONEOUS DETERMINATIONS AND THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT HAS NEVER BEEN CONSIDERED?

2.

WHEN PARTIES HAVE LITIGATED THE SAME ISSUES IN STATE COURT FOR TWO (2) YEARS RESULTING IN A RECORD OF ONE THOUSAND TWO HUNDRED NINETY THREE (1,293) PAGES; DEPOSITION TESTIMONY OF ONE THOUSAND EIGHT HUNDRED FIFTY (1,850) PAGES AND LITIGATION COST TO THE DEFENDANTS OF SIXTEEN THOUSAND DOLLARS ($16,000.00), IS ABSTENTION APPROPRIATE WHEN THE SAME ISSUES ARE PRESENTED IN FEDERAL DISTRICT COURT?

PARTIES TO THE PROCEEDING

Pursuant to Rule 21.1(b) The Becnel Company and Thomas Becnel certify that the following are parties to the proceedings:

STEVEN J. DUPUIS, SR.,
STEVEN J. DUPUIS, JR., IRREVOCABLE INTER VIVOS TRUST,

JAMES H. DUPUIS, SR.,
JAMES H. DUPUIS, JR., IRREVOCABLE INTER VIVOS TRUST,

JOHN W. DUPUIS, III,
JOHN W. DUPUIS, IV, IRREVOCABLE INTER VIVOS TRUST,

THOMAS R. BECNEL, and THE BECNEL COMPANY,

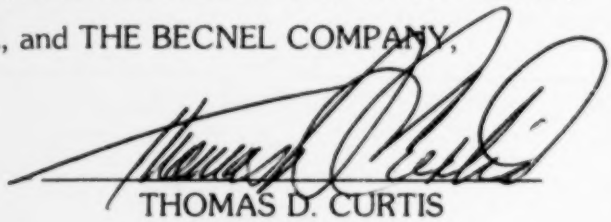

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TABLE OF CONTENTS

PAGE

Cover Sheet i

Questions Presented ii

Parties to the Proceeding iii

Table of Contents iv

Table of Citations ..... v-vii

Opinions of the Courts Below 1

Jurisdiction 1

Concise Statement of the Case 2

Argument 7

Abstention or Stay is Appropriate 13

Conclusion 20

Certificate of Service 21

TABLE OF CITATIONS

ACF Industries, Inc. v. Guinn, 384 Fed. 2nd 15 (5th Cir. 1967) 3

ACS, Inc. v. Aetna Casualty and Surety Company, 544 Fed. Supp. 128 (District Court of Pennsylvania, 1982) 17

Arkwright-Boston Manufacturers Mutual v. City of New York, 762 Fed.2d 205 (2nd Cir. 1985) 17

Board of Education of Valley View v. Bosworth, 713 Fed.2d 1316 (7th Cir. 1983) 15

Building Engineering Services v. State of Louisiana, 441 So.2d 417 (4th Cir. 1983) 12

Burford v. Sun Oil, 63 Supreme Court 1098 (1943) 16

Cohen v. Beneficial Industrial Loan Corporation, 69 Supreme Court 1221 (1949) 1, 2, 7

Colorado River Conservation District v. United States, 96 Supreme Court 1236 (1976) 7, 8, 13, 14, 15, 16, 17

Cristina v. Department of State of New York, 417 Fed. Supp. 1012 (New York, 1976) 17

Dubroff v. Dubroff, 833 Fed. 2d 557 (5th Cir. 1987) 19

Filtrol Corporation v. Kelleher, 467 Fed. 2d 242, 244 (9th Cir. 1973) 3

Gilbane Building Company v. Nemours Foundation, 568 Fed. Supp. 1085 (District Court of Delaware, 1983) 16

HMK Corporation v. Walsey, 637 Fed. Supp. 710 (District Court of Virginia) 18

Lary v. Ansari, 817 Fed.2d 1521 (11th Cir. 1987) 18

Klien v. Walston, 432 Fed.2d 936 (2nd Cir. 1970) 19

Mitchell v. Bertolla, 349 So.2d 287 (1976) 11

Moos v. Wells, 585 Fed. Supp. 1348, 1350 (District Court of New York, 1984) 16

Moses H. Cone Memorial Hospital v. Mercury Construction,
103 Supreme Court 127 (1983) 1, 2, 7, 13

Muniz v. Mercantile Texas Credit Corporation,
833 Fed.2d 541 (5th Cir. 1978) 10, 11

North American Van Lines v. State Board of Tax Commissioners,
590 Fed. Supp. 311 (District Court of Indiana, 1984) 16

Oler v. Trustees of California State Universities and Colleges,
80 FRD 319, (California, 1978) 15, 16

PPG Industries v. Continental Oil Company,
478 Fed.2d 674 (5th Cir. 1973) 8

Pullman, Younger and Burford 13, 16

Railroad Commission v. Pullman Company,
61 Supreme Court 634 (1941) 16

Rollins v. Dwyer, 666 Fed.2d 141 (5th Cir. 1982) 11, 12

Shomber By Shomber v. Jule Companies, Inc.,
614 Fed. Supp. 210, 218 (District Court of Illinois) 19

Texaco v. Borda, 383 Fed.2d 607, 608 (3rd Cir. 1967) 3

Weiner v. Shearson, 521 Fed.2d 817 (9th Cir. 1975) 19

OPINIONS OF THE COURTS BELOW

1.

The United States District Court for the Western District of Louisiana entered an unreported decision on January 8, 1988 in the matter captioned Steven Dupuis, et al v. Thomas R. Becnel, et al bearing docket number 87-1781-0 denying a Motion for Abstention.

2.

The Opelousas Division of the United States District Court for the Western District of Louisiana entered an unreported decision on January 25, 1988 an amendment to that decision on January 27, 1988 denying the Motion for New Trial and certifying the matter for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

3.

The United States Court of Appeals for the Fifth Circuit entered a decision in the matter captioned Steven Dupuis, et al v. The Becnel Company, et al bearing appeal docket number 88-9017 on April 6, 1988 denying the petition for leave to appeal and alternative writ of mandamus.

4.

The United States Court of Appeals for the Fifth Circuit entered a decision in the matter captioned Steven J. Dupuis, et al v. The Becnel Company, et al bearing docket number 88-9017 on May 3, 1988 denying the Petition for Rehearing.

JURISDICTION

This matter was brought in the Federal District Court alleging jurisdiction under 15 U.S.C. Section 77b; 15 U.S.C. Section 78 aa; Rule 10b-5; 18 U.S.C. 1964(c). Claims were based upon alleged violations of Federal Securities Laws and pendent State claims.

There are no constitutional provisions, statutes, ordinances or regulations involved. Jurisdiction lies in the United States Supreme Court pursuant to 28 U.S.C. 1254 and 28 U.S.C. 1651. Jurisdiction of the United States Supreme Court to consider grants and denials of Motions for Abstention has been set forth in **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 127 (1983) and **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949).

CONCISE STATEMENT OF THE CASE

The United States Supreme Court has determined that an immediate appeal is appropriate when a lower Court denies or grants a Motion to Abstain or Stay based upon parallel state litigation. In **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 127 (1983), the Supreme Court discussed reviewability of an order relating to a request for stay in view of pending State litigation. A party sought review by alternative routes. A notice of appeal was filed pursuant to 28 U.S.C. 1291 as opposed to 1292. Review was also sought under 28 U.S.C. 1651; page 933.

The Supreme Court found that the Stay Order was final for purposes of appellate jurisdiction; page 933. **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949) was cited during the course of the opinion; page 934. The latter case noted the applicability of 28 U.S.C. 1292 to appeals from interlocutory orders. On page 1225 of the **Cohen** decision it is noted that 28 U.S.C. 1292 was not material to that case but it is a provision which is made to allow appeals from orders other than final judgments which have a final and irreparable effect on the rights of the parties.

In **Cohen,** it was determined that a small class of decisions exist that determine matters of right separable from, and collateral to, rights asserted in the actions which are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated; pages 1225, 1226.

Moses interprets the **Cohen** decision on page 934 as encompassing certain factors of importance as follows:

> To come within the small class of decisions excepted from the final judgment rule by **COHEN** the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment.

Our case definitely fits within this class. The rulings have conclusively determined that the lower court will not abstain or stay the action. This has been done even though the State litigation has now been ongoing for more than two (2) years. The underlying issues and the cause of action are the same. Seventeen (17) months expired between the time that the State petition was filed and the filing of the Federal petition.

The question of propriety of abstention or stay is totally separate from the merits of the claim and if the Court allows this matter to proceed to judgment, there is no relief that can be obtained on appeal. Thus, our rights are irreparably and finally determined.

The United States Court of Appeals for the Fifth Circuit has previously recognized the reviewability of a ruling on a request for abstention. **ACF Industries, Inc. v. Guinn,** 384 Fed.2d 15 (5th Cir. 1967) reversed a decision by the District Court refusing to stay a proceeding in Texas pending the determination of similar litigation in Kansas. At page 18, footnote 9, the Fifth Circuit determines that when a lower court refuses to issue an order pursuant to 28 U.S.C. 1292(b), mandamus may be issued to review a District Court's grant or refusal of a stay of proceedings. The same is true in other circuits, see: **Filtrol Corporation v. Kelleher,** 467 Fed.2d 242, 244 (9:h Cir. 1973); **Texaco v. Borda,** 383 Fed.2d 607, 608 (3rd Cir. 1967).

A complaint was initially filed by the plaintiffs against the defendants in the Fifteenth Judicial District Court for the State of Louisiana on December 31, 1985. This State petition formed part of the record below and is appended hereto as Exhibit E. Paragraphs 3 and 4 of Exhibit E reveal that The Becnel Company and Thomas Becnel are alleged to be liable to the plaintiffs for willful misconduct, gross negligence and/or intentional breach of contractual, legal and/or fiduciary obligations as well as alleged deceit, false misrepresentations, artifice and/or concealment for matters arising from the operation and formation of a limited partnership. Paragraph 8 alleges that these actions have violated State and Federal laws. Subparts of that paragraph set forth claims of false and misleading statements to the plaintiffs as inducements to enter a partnership on June 21, 1981; false and misleading statements concerning contributions, activities, financial rewards and detrimental reliance; perpetuation of these activities to induce the formation of the partnership and continuation of the partnership.

Subsequent paragraphs detail the alleged misdeeds. Paragraphs 10 through 13 allege that the plaintiffs made the contribution required for entry into the partnership. This was land. They received a priority distribution right for this contribution. However, claim is made that the defendants failed to make their contribution which was to be know-how, development, leasing and management together with certain small monetary contributions.

Paragraphs 14 through 16 state that the defendants made use of false or misleading pro formas or projections of significant spendful income to secure plaintiffs' entry into the partnership. Supposedly, none of the projections reveal that payments could be made for management, leasing or loan commitments. Exorbitant charges were allegedly paid for these services to the defendants in companies which they owned or controlled so as to deprive the plaintiffs of disposable earnings all of which was used to obtain economic advantage over the plaintiffs; paragraphs 19 and 20.

Paragraph 21 sets forth a list of alleged transgressions. These include failure to pay capital contributions; failure to contribute know-how, development, construction, management, leasing, plans, building contracts, commitments and options; failure to spend funds solely for partnership purposes; causing contracts to be entered with themselves and those they control at exorbitant rates; failing to keep books and account to the plaintiffs; admission of new partners; breaches of fiduciary, contractual and legal obligations.

Then, paragraphs 22 through 24, in a general fashion, once again set forth claims of mismanagement, failure to disclose conflicts of interest, failure to adequately advise, violation of partnership duties, failure to account, willful misconduct, gross negligence and intentional breaches of duty.

Paragraphs 27 through 29 state that the defendants made misrepresentations in order to deceive and manipulate the plaintiffs. This was done through a device, scheme or artifice by means of misrepresentations of material facts and omissions to provided material facts necessary to make the statements understood under the circumstances in which they were made. Paragraph 31 alleges that the defendants knew or in the exercise of reasonable care could have known the untruths or omissions.

Plaintiffs seek the return of improperly paid funds plus interest; court appointment of a manager of the partnership; court appointment of a special master to perform an accounting; withdrawal from the partnership; return of the value of their investment plus interest and attorney's fees; dissolution and liquidation of the partnership and damages including treble damages.

By order dated January 3, 1986 appearing at the foot of the State Court petition, the Fifteenth Judicial District Court assumed jurisdiction over the partnership assets and agreed to make a determination of the interim relief demanded by the plaintiffs.

On August 19, 1987, the same plaintiffs sued the defendants herein based upon the same allegations in the United States District Court for the Western District of Louisiana. A copy of that petition is appended hereto as Exhibit F. Although the form is somewhat different and the order of presentation is changed, the claims are the same. According to that petition:

> The defendants approached the plaintiffs with a development plan. Becnel was to have the know-how to develop, construct, finance, lease and manage the project; paragraph 6-7. Projections of profits were provided with assertions that the project would generate significant income and the plaintiffs were to receive a priority distribution right; paragraphs 8-9. Great trust and confidence was placed in the defendants; paragraphs 10-11. The partnership was formed but the defendants failed

to make their capital contribution; paragraphs 12-13. The defendants admitted new partners and paid unauthorized management, commitment and leasing fees which deprive the plaintiffs of earnings; paragraphs 15-16. Defendants diverted a tenant and demanded waiver of the preferential payment provision; paragraphs 17-18. Defendants made misrepresentations, misleading statements and omitted facts in that the investment has not produced a reasonable return, income was diverted, defendants' contributions were not made, defendants did not provide accounting, defendants paid unauthorized management, leasing and commitment fees; pro formas and projections were false and misleading, the defendants did not have the skill and know-how claimed, defendants breached fiduciary duties; paragraph 19.

Several general paragraphs then followed setting forth the relief demanded. They seek the return of their consideration, an accounting, damages, interest, attorney's fees and treble damages.

The claims are the same. The underlying allegations are the same. Relief sought is the same except that the plaintiffs have additionally sought supervised dissolution and liquidation of the partnership in State Court. To that end, the State Court has assumed jurisdiction over the partnership assets. The State claim alleges breaches of State and Federal law. Federal claim alleges breaches of Federal and State law.

During the seventeen and one-half (17½) month period between the filing of the State claim and the filing of the Federal claim much has occurred in the State Court litigation. Exhibit H appended hereto, is the appendix of the record on appeal. It reveals that the record on appeal in the State matter as of June, 1987 consisted of one thousand two hundred ninety three (1,293) pages of pleadings, motions, documents and orders. The Clerk's cost sheet is appended as Exhibit G and reflects cost advanced in the State litigation of SEVEN THOUSAND ONE HUNDRED THIRTY EIGHT DOLLARS ($7,138.00).

Additionally, more than one thousand eight hundred fifty (1,850) pages of deposition testimony has been taken and more than three thousand (3,000) pages of exhibits have been attached in the State matter. Deposition cost in the State litigation exceeds SIX THOUSAND EIGHT HUNDRED FORTY FOUR DOLLARS ($6,844.00) and the appeal cost alone for the defendants is ONE THOUSAND THREE HUNDRED FORTY EIGHT DOLLARS ($1,348.00).

A special judge has been assigned to hear the State matter and two (2) trial dates have already been assigned. The first was lost because of discovery problems. The second was upsst at the request of the plaintiffs in order to seek a determination of a legal question concerning whether one partner

could sue another during the existence of the partnership for matters arising from the partnership. This question was decided adversely to the plaintiffs by the Third Circuit Court of Appeals for the State of Louisiana and is presently pending on an application for writs in the Supreme Court for the State of Louisiana. It is presently the subject of a Motion to Dismiss based upon lack of standing by the plaintiffs in the Federal matter. Thus, the potential for conflicting Federal and State judgments is already manifest.

In contrast, only a Petition, Answer, Motion for Standing Order, Motion for Abstention or Stay, Motion for New Trial and Motion to Dismiss existed in the Federal Court.

A determination of the underlying issues and allegations in the State or the Federal tribunal are surely binding on each other. The Defendants are not to be compelled to litigate the same issues on two (2) fronts. Plaintiffs initially chose to litigate their grievances in State Court. They have vigorously pursued that litigation and they should not be permitted to start over after so much time and effort has been expended.

The denial of our request to abstain or stay has resulted in a determination from which we cannot obtain adequate relief on appeal following judgment. It has finally and irreparable determined our right. Any policy against piecemeal appeals must yield to the ultimate goal of justice.

ARGUMENT

DOES A POLICY AGAINST PIECEMEAL APPEALS OVERRIDE A POLICY AGAINST PIECEMEAL LITIGATION WHEN A DISTRICT COURT HAS BASED ITS REFUSAL TO ABSTAIN ON OBVIOUSLY ERRONEOUS DETERMINATIONS AND THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT HAS NEVER BEEN CONSIDERED?

The Fifth Circuit Court of Appeals denied our petition for rehearing on May 3, 1988. A denial of our alternative petition for permission to appeal and for writ of mandamus had been denied on April 6, 1988.

According to that denial which is attached as Exhibit D:

> Becnel has not overcome this Court's policy against piecemeal appeals . . .
>
> Becnel has not established that the resolution that the question present would materially advance the ultimate termination of the litigation.

If we are not allowed appellate review of the denial of abstention, we are finally and irreparably effected without benefit of a review. Prior Supreme Court decisions have recognized the plight of litigants in our position. It has announced that we are entitled to review through either the interlocutory appeal or writ of mandamus; **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 927 (1983); **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949).

A policy against piecemeal appeals must give way to justice. There is an even greater overriding policy which prohibits piecemeal litigation; **Colorado River Conservation District v. United States,** 96 Supreme Court 1236 (1976); **Moses H. Cone Memorial Hospital v. Mecury Construction,** 103 Supreme Court 927, 936 (1983).

The District Court determined that the State litigation and Federal litigation were based upon different causes of action; Exhibit B. It also determined that the Federal litigation was "founded exclusively upon RICO, a Federal statute with entirely different elements than State law breach of contract allegations"; Exhibit C. Both of these determinations are obviously incorrect when the State and Federal petitions are considered together.

The Supreme Court has announced the factors that are to be considered upon a Motion for Abstention. These factors were never considered. Our situation satisfies all of those factors.

The ruling of the Court of Appeals for the Fifth Circuit states that we ailed to show that a resolution of the question presented **would** materially dvance the ultimate termination of the litigation; Exhibit A. This is ubstantially different than what is required under 28 U.S.C. 1292 (b). We are equired only to show that the appellate decision "may" materially advance he ultimate termination of the litigation.

This goes hand and hand with the fourth factor of **Colorado River** vhich is the extend to which the Federal litigation has progressed. Obviously, State Court action which has progressed to the extent revealed in our xhibits should conclude prior to the Federal litigation which has only rogressed to the extent that an answer has been filed. The similarity between he two (2) claims will have the probable effect of concluding this matter ompletely under principles of res judicata and the prohibition of splitting laims found in Article 425 of the Louisiana Code of Civil Procedure. Once the arties are allowed to focus their attention in one (1) forum the ultimate ermination of the litigation may be materially advanced. This is all that is equired. The certificate supplied in compliance with 28 U.S.C. 1292(b) rovides the determination that a decision "may" advance termination of the itigation.

We are aware that the Fifth Circuit has a policy against piecemeal ppeals. The Supreme Court has recognized a policy against piecemeal itigation in cases previously cited herein. Allowing these cases to proceed ased upon the same issues at the same time is piecemeal litigation.

We would like to refer the Court to an early decision by the Fifth Circuit vhich condemned concurrent litigation; **PPG Industries v. Continental Oil Company,** 478 Fed.2d 674 (5th Cir. 1973). The Court states at page 680:

> Even when two (2) Courts of concurrent jurisdiction do not require control over an identifiable res, concurrent litigation of the same controversy is perceived as interference. Secondly, the quoted sentences show concern for economy of judicial time and disinclination to encourage duplication of effort . . .

A parallel consideration is the undesirability of imposing upon the itigants and witnesses the double burden of two (2) trials. Finally, the Courts ave recognized as generally "unwanted and highly undesirable (the) race by ach party to obtain a decision from the particular reacting most favorably to s position".

We suggest to this Honorable Court that the decision of the Appeals Court which denies our opportunity to obtain review of the lower Court ecision which finally and irreparably determines our rights is incorrect. The etermination by the District Court that the underlying issues are

substantially different and insinuating that the State litigation is based upon contract is erroneous. The factors set forth by the Supreme Court for reaching a proper determination upon a request for abstention or stay has never occurred. Furthermore, this mafter is directly appealable under 28 U.S. C. 1292(a)(1) as a refusal of injunctive relief.

WHEN PARTIES HAVE LITIGATED THE SAME ISSUES IN STATE COURT FOR TWO (2) YEARS RESULTING IN A RECORD OF ONE THOUSAND TWO HUNDRED NINETY THREE (1,293) PAGES; DEPOSITION TESTIMONY OF ONE THOUSAND EIGHT HUNDRED FIFTY (1,850) PAGES AND LITIGATION COST TO THE DEFENDANTS OF SIXTEEN THOUSAND DOLLARS ($16,000.00), IS ABSTENTION APPROPRIATE WHEN THE SAME ISSUES ARE PRESENTED IN FEDERAL DISTRICT COURT?

Originally, the District Court ruled on January 7, 1988. This ruling is appended hereto as Exhibit B. The Court stated that the claim before it was based upon RICO and thus the issues in the two (2) cases were substantially different. Therefore, abstention or stay was said to serve no purpose.

A Motion for New Trial was presented and a ruling was issued on January 25, 1988 with an amendment on January 27, 1988 providing the certificate required by 28 U.S.C. 1292(b); Exhibit C. That ruling recognizes that the State and Federal actions are based upon similar underlying transactions. However, the Court goes on to state that the Federal claims are based exclusively upon RICO and implies that the State claim is based upon breach of contract. Reading the Federal claim establishes that relief is sought under the Securities Act of 1934 and Rule 10b-5 (Count 1) the Securities Act of 1933 (Count 2); RICO (Count 3) and appended State claims (Counts 4 through 7); Exhibit F.

Reading the State claim establishes that allegations are made and relief is sought for Federal and State laws, breach of fiduciary duty, breach of contract, misrepresentations, omissions of material fact, manipulation, fraud, tort, violations of partnership articles, violations of corporate law, violations of consumer protection statutes and violations of securities statutes; paragraphs 8, 25-43; Exhibit E. Allegations of misrepresentations, false statements, misleading statements, omissions of material fact, diversion of income, manipulation of concealment are asserted in support of the relief claimed.

Relief cannot be obtained in the Federal matter without proof of exactly the same facts which must be proved to obtain relief in the State action.

The United States Court of Appeals for the Fifth Circuit has recognized that Federal Courts must give effect to State Court judgments determining issues which are reurged in RICO claims; **Muniz v. Mercantile Texas Credit Corporation,** 833 Fed.2d 541 (5th Cir. 1987). The litigation involved a usury claim. Counterclaims alleging usury were originally urged in the State Court. A subsequent action was commenced in Federal Court alleging RICO violations based on the same underlying transactions. Thereafter, judgment on the claims were entered in the State Court. A determination was made that the State judgment precluded litigation in the Federal action based on the Federal causes of action.

This case directly supports our position. Simply restyling the requested relief to set forth a RICO demand and specifically spelling out Federal securities demands does not result in a substantially different issue as decreed by the District Court. A substantial basis for a difference of opinion exists. The interest of the parties is not served by proceeding in two (2) forums when a determination of the underlying issues in one (1) forum will result in dismissal in the other. A waste of judicial recourses occurs. The litigation has now been going on in excess of two (2) years in the State Court and has progressed to the State Supreme Court. It should be allowed to proceed to determination without the parties having to litigate the same matter at the same time in Federal Court.

Muniz considered the effect of judgments under Texas law. The result is the same under Louisiana law. As stated in **Muniz:**

> It is well settled in determining that the preclusive effect of prior State Court judgments, the Federal Courts must apply the law of the state from which the judgment emerged.

Under Texas law, collateral estoppel was available and acted to prevent relitigation of an issue of ultimate fact which had been determined by final judgment. Thus, although RICO was not mentioned in the State suit, the petitioners could not relitigate the same facts in a Federal claim by simply relabeling the claim under RICO.

This is exactly what petitioners are attempting to do in the present litigation. They have been attempting to establish a claim based upon the same underlying transactions for two (2) years within the State system. They are aware that their attempts in this regard are not panning out. They are now attempting to hold out another claim in the event they are unsuccessful in their State claim. Louisiana Code of Civil Procedure Article 425 does not permit such an effort. That article states:

> An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof. If he brings an action to enforce only a portion of the obligation, and does not amend his pleading to demand the enforcement of the full obligation, he shall lose his right to enforce the remaining portion.

Once the State matter is tried, the petitioners are precluded from urging their RICO demands since the alleged basis for that demand was in existence and known to them during the pendency of the State action. This will preclude litigation of the claims in Federal Court based upon the same underlying transactions.

The plaintiffs will also be barred from relitigation by res judicata. L.R.S. 13:4231 provides:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded upon the same cause of action; the demand must be between the same parties and formed by them against each other in the same quality.

All of these elements are present. Petitioners are demanding damages, liquidation of the partnership, treble damages and withdrawal from the partnership. To the extent that the demands in the State litigation for liquidation and withdrawal are not made with specificity in the Federal litigation it is of no consequence because the validity of the demands made in Federal litigation will be determined along with the additional demands made in the State litigation. The underlying elements in the Federal litigation are fraud, misrepresentations, omissions of material fact, breach of fiduciary duty, etc. These are the same underlying elements of the State litigation. They must be proved to allow recovery in either claim. Judgment in one (1) forum must preclude judgment in the other.

The cause of action is the same. **Mitchell v. Bertolla,** 349 So.2d 287 (1976) had occasion to set forth the meaning of "cause of action". At page 291 it was determined that the plaintiffs' prior claims to set aside an option and the plaintiffs' present suit were brought upon different grounds (fraud/lesion) but constituted the same cause of action. The Court states that "cause of action" for res judicata purposes is the same as "cause"; page 292. "Cause" is defined as the material fact which is the basis for the right claimed; page 291. Obviously, the material facts in both the Federal and State litigation are the same and must be established for the plaintiffs to prevail in either litigation.

In **Rollins v. Dwyer,** 666 Fed.2d 141 (5th Cir. 1982), the Fifth Circuit Court of Appeals tells us that a State Court judgment contains the same res judicata effect as it would have in the Court that rendered it whether the State Court applied State or Federal laws; page 144. There, the plaintiffs were

seeking to recover attorney's fees under 15 U.S.C. 1635 alleging that recovery was not barred by denial of attorney's fees in a prior judgment in an action brought under 15 U.S.C. 1640 because the "cause" was not the same. This position was not accepted by the Court. Footnote 7 in that decision found at page 146 also states that a plaintiff cannot assert, in a second action, claims which are not asserted in the first. All issues presented by the pleadings and on which evidence was offered would be regarded as disposed of by final judgment.

The same conclusion should be reached herein. It does not matter that the plaintiffs have now decided to relabel their demand and seek to recover under RICO or specified Federal statutes. Simply changing the statutes or captions does not change the "cause" of the litigation. Violation of Federal laws is alleged in the State litigation.

The final element which must be satisfied for res judicata purposes is that the demand must be between the same parties. Merely looking at the two (2) petitions can leave no doubt that the demands brought in State Court consist of the same parties which are presently before the Federal Court. Those demands are also asserted in the same capacity. The fact that additional parties appear in the State action is of no consequence. **Building Engineering Services v. State of Louisiana,** 441 So.2d 417 (4th Cir. 1983) considered such a question. Prior litigation had been brought which included more parties than the litigation under consideration. This did not eliminate the application of res judicata. On page 421 the Court states that the critical inquiry was whether the parties in the second case had litigated the questions in the first. An absence of defendants who were present in the first suit but not in the second did not stop the application of res judicata.

Whether the plaintiffs have standing to bring the claims against their partners prior to dissolution and liquidation of the partnership is presently before the Supreme Court of the State of Louisiana upon an application for writs by the plaintiffs in the State matter. Standing is to be determined by the law of the state; Rule 17 of the Federal Rules of Civil Procedure. A Motion to Dismiss based upon lack of standing is presently before the District Court based upon the same claims as have previously been made in the State Court. The potential for conflicting judgments is already realized in this matter.

There is no difference in the issues in the two (2) petitions. The Federal claim is not based exclusively upon RICO and the State claim is surely not based upon breach of contract. These determinations are manifestly erroneous. No consideration has ever been given to the factors which are to be weighed to decide whether abstention is appropriate. We have simply been ignored because of a policy against "piecemeal appeals".

ABSTENTION OR STAY IS APPROPRIATE

As the complexities and volume of litigation grew, the United States Supreme Court determined that reasons might exist for Federal Courts to decline an opportunity to decide a claim over which it had jurisdiction beyond those announced in **Pullman, Younger and Burford.** The case of **Colorado River Conservation District v. United States,** 96 Supreme Court 1236 (1976) was decided. Therein, the Court determined that a Federal Court could decline to hear a case when a similar action is pending in State Court after giving weight to the following factors:

1. Possibility of avoiding piecemeal litigation;
2. The convenience of the forum;
3. The order in which jurisdiction attached;
4. The extent to which Federal litigation has progressed;
5. The degree to which the rights and questions were particularly local.

Attention was given to each factor and abstention was found to be appropriate.

Then, the Court again considered the question in **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 927 (1983). That Court reiterated that abstention was proper in **Colorado River** for "considerations of wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation", page 936. It was recognized that the foremost consideration in **Colorado River** was avoidance of piecemeal litigation. A priority element of jurisdiction was to be measured not in terms of time but by progress made in the two (2) actions; page 940. Finally, another factor was added which was whether the issue involved State or Federal law; page 941.

A proper analysis of our request for abstention guided by these decisions must lead to abstention. The claims are the same. Factual allegations are the same. Damages, treble damages, cost and attorney's fees and equitable relief are sought in each. Federal statutes are not mentioned by name in the State claim as they are in the Federal claim but the allegations and demands are couched in those terms. Assertions are made that the State statutes and Civil Code Articles permit the same relief as that asserted under the Federal statutes. Allowing the Federal matter to continue as the State matter progresses through trial and appeal can only result in piecemeal litigation.

As the State Court and Federal Court reach decisions upon certain questions and issues, those issues and questions must also be ruled upon in the other Court. The number of pleadings must progress in a logarithmic fashion as each decision creates issues of res judicata, collateral estoppel and issue preclusion; not to mention the problem of inconsistent verdicts and judgments.

Lafayette is the more convenient forum. All of the parties live in Lafayette. The partnership is in Lafayette. The evidence and most of the witnesses are in Lafayette. The misdeeds are allegedly committed in Lafayette. There is no connection with Opelousas whatsoever. Plaintiffs chose the forum. Initially they chose the District Court for the State of Louisiana in the Parish of Lafayette and were content to remain there for seventeen and one-half (17½) months. There has been no significant progress beyond answer in the Federal District Court. In comparison, our State Court file occupies three (3) storage drawers. One thousand two hundred ninety three (1,293) pages composed the record on appeal. Extensive appeal briefs have been written by both sides. There are one thousand eight hundred fifty (1,850) pages of deposition testimony and three thousand (3,000) pages of exhibits in the State action. Cost in the State action presently exceeds SIXTEEN THOUSAND DOLLARS ($16,000.00) without counting the cost of attorneys.

The rights asserted are alleged to be the rights of partners arising from the formation of the partnership and the partnership activities. These matters are particularly local. Partnership relation is governed by extensive articles found within the Louisiana Civil Code; Article 2801 et seq. As reflected in the State Court petition, the alleged acts are the subject enumerable articles and statutes.

The primary factors in **Colorado River** are all answered in favor of abstention. **Moses** added an additional factor of whether the issues involved State or Federal law. This litigation involves both. The plaintiffs alleged the violation of Federal Statutes in their State petition. It is proper to allow the matter to proceed on all issues in the State Court.

This claim was brought two (2) months after the matter was scheduled for trial in State Court. A special judge has been appointed in the State Court to try this case so there should be no difficulty in obtaining a quick trial date. The only difference in the proceedings is the caption of the demands. Plaintiffs herein are attempting to amend their pleadings at the eleventh hour in another forum. This should not be allowed.

It is also noted in **Moses** that the party's willingness to litigate similar questions in State Court should receive some attention. These plaintiffs cannot be heard to say that they are not willing to litigate these questions in State Court. They have been doing so for more than twenty four (24) months.

One other thought in **Moses** warrants discussion. At page 937, the Court again sets forth the ancient decree that the Court first exercising jurisdiction over property may exercise that jurisdiction to the exclusion of all other Courts. Jurisdiction over the partnership property has been first

exercised by the State District Court. The order at the foot of the petition; Exhibit E, establishes that the State Court has already decided to determine the fate of the property and the partnership. It has agreed to determine the appointment of a special master, liquidator, conservator and/or commissioner to manage the partnership if deemed appropriate following trial. The same is true for the appointment of an expert for the rendering of an accounting evaluation of the partnership if deemed appropriate following trial. It has been given jurisdiction over the partnership and the assets to determine the propriety of withdrawal by the plaintiffs and/or dissolution of the partnership. Also, the Court can appoint a liquidator to seek reimbursement of any improperly paid sums and direct a preferential distribution of assets if appropriate along with other equitable remedies. Jurisdiction over the property exist in the State Court.

This discussion also bears on the question of piecemeal litigation. If a determination is made allowing any of the requested reliefs, where does that leave the question in Federal Court? If the State Court enters judgment determining that the allegations of the plaintiffs are goundless, where does that leave the Federal Court if it has not abstained? According to the rulings issued by the District Court, it would appear that we would be required to relitigate those claims. We submit that our authorities have established that this is not proper and that abstention should be mandated.

Cases at the Appeal and District Court level also support our position. **Board of Education of Valley View v. Bosworth,** 713 Fed.2d 1316 (7th Cir. 1983) involved a question of whether a Federal Court in Illinois should abstain from hearing a claim that certain government officials had failed to distribute certain tax revenues plus interest to local public entities. The Court found that abstention was improper under considerations of "comity" or questions concerning clarity of State law, page 1320. However, abstention was proper because of the pendency of parallel State Court proceedings, page 1321. In reviewing the factors set forth in **Colorado River,** the Court states:

> "The decision to abstain does not rest on a mechanical check list but on a careful balancing of important factors as they apply in a particular case, with the balance weighted in favor of jurisdiction. The weight to be given any one factor may vary greatly from case to case depending on the particular setting".

We suggest that the extensive efforts in the State Court weigh heavily in favor of abstention and first jurisdiction over the property mandates it.

In **Oler v. Trustees of California State Universities and Colleges,** 80 FRD 319, (California, 1978), the State Court proceeding had been filed one (1) year prior to the Federal proceedings. It had been actively prosecuted and discovery was well under way. At page 321, it is determined that when the plaintiff initially makes the choice and raises Federal questions in State Court,

he cannot be said to be deprived of any right to a Federal Court. Herein, the plaintiffs made their choice to litigate the Federal claims in the State system. They should be required to continue in that single effort rather than divide their efforts after two (2) years. The Federal claims were no less existent at the time they made their choice. The language of the petition reveals undeniably that the petitioners must have been aware of Federal claims.

The parties defendant in the State action are not exactly the same as the parties defendant in the Federal action. However, plaintiffs allege that all the parties in the State action were indispensable for complete relief (paragraph 5 of the State petition). The more complete relief is available in the State Court. To the extent that there is any question as to the permissibility of abstention when there is a difference in the parties, **Gilbane Building Company v. Nemours Foundation,** 568 Fed. Supp. 1085 (District Court of Delaware, 1983) holds at page 1089:

> The criteria for determining abstention does not require that the actions be identical. The actions may involve two (2) different parties.

Of course, if this Court does not feel that the Federal claims are asserted in the State action, that is not necessary. **Railroad Commission v. Pullman Company,** 61 Supreme Court 634 (1941) established that it is not even necessary for a State action to be pending for abstention to be appropriate. A similiar result is reached in **Moos v. Wells,** 585 Fed. Supp. 1348, 1350 (District Court of New York, 1984).

North American Van Lines v. State Board of Tax Commissioners, 590 Fed. Supp. 311 (District Court of Indiana, 1984) arose from a challenge to the constitutionality of a change in the Indiana tax laws. The Court raised the question of abstention on its own motion and discussed the four types; **Pullman, Burford, Younger** and **Colorado River.** The parties in the Federal and State litigation were not the same and a question over a State law was on appeal, page 314. The same is true here.

On pages 315 and 317, a stay was found to be appropriate based on wise judicial administration of judicial resources. Courts could also consider the vexatious nature of the suit and determining the propriety of abstention under **Colorado River.** This is the fourth time that the plaintiffs herein have sued the defendants herein. Surely, this must rise to the level of vexatiousness.

A claim arose from an attempted conversion of a building from a leased premises to a cooperative ownership in **Moos v. Wells,** 585 Fed. Supp. 1348 (District Court of New York, 1984). Suit had been commenced in the State Court in 1981 and Federal Court in 1984. Abstention was found to be proper under **Burford v. Sun Oil,** 63 Supreme Court 1098 (1943) because the Federal Court should abstain from deciding State law issues of vital concern

to the State. The rights of the parties turned on State and local law with which the State Courts were most familiar. The housing law was controlled by comprehensive State legislation, page 1350. Here the Louisiana Partnership Law, Corporate Law, Tort Law and Fiduciary Laws are very extensive.

In the final paragraph on page 1350, the Court notes that abstention is proper even where the Federal claims are not expressly raised in the State action.

Cristina v. Department of State of New York, 417 Fed. Supp. 1012 (New York, 1976) arose when the plaintiff brought a claim in Federal Court alleging violation of his rights under 42 U.S.C. 1985 and the Fourteenth Amendment. Abstention was found to be appropriate even where there is a specific statutory directive of Federal jurisdiction. This is especially true where the Court is presented with a difficult question of State law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, page 1015. The questions involving partnership law herein are certainly difficult. That question has been ruled upon in the State District Court and twice by the Third Circuit Court of Appeals and is now again waiting determination in the Louisiana State Supreme Court of Appeals. Obviously, the regulatory scheme for partnerships in Louisiana is of substantial public import and reaches far beyond the result in this particular case.

It is not necessary that the issues in each case be exactly the same. **ACS, Inc. v. Aetna Casualty and Surety Company,** 544 Fed. Supp. 128 (District Court of Pennsylvania, 1982) arose from issues relating to the interpretation of provisions within an insurance policy. A similar case was docketed in the State of California, page 130. In resisting abstention, the third party plaintiff argued that the same issues and parties were not present in California. The Court responded that "so long as there is substantial similarity between the State and Federal action, the Court may freely exercise its discretion and dismiss the complaint", page 131.

Arkwright-Boston Manufacturers Mutual v. City of New York, 762 Fed. 2d 205 (2nd Cir. 1985) was a diversity action asserting surrogation claims. The case of **Colorado River** is noted at page 210 with an observation that the decision of abstention is within the sound discretion of the Court. An important discussion is found at page 211 recognizing the potential for piecemeal litigation in that (a) many claims were pending in the State Court involving more parties than those presently in the Federal Court; (b) the defendant would be forced to defend complex litigation on two fronts without a stay in the Federal matter; (c) there was the possibility of inconsistent verdicts and the breeding of added litigation because of claims of res judicata and issue preclusion. The Court states:

> The existence of such concurrent proceeding creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the issues first which would be prejudicial, to say the least, to reasoned decision making by either forum . . . maintaining virtually identical suits in two forums would waste judicial resources and invite duplicative effort.

The next question was how much effort had been made in each forum and which forum provides the substantive rule to determine the merits. It was determined that a serious question of whether New York law allowed a party to recover for a tort without physical injury existing. Besides the ability of one partner to sue another at the present time, a serious question also exists in this litigation as to whether the partners have standing to assert the claims which they are attempting to assert.

The case of **Lary v. Ansari,** 817 Fed. 2d 1521 (11th Cir. 1987) arose in the context of multi-suit litigation. The plaintiff had originally sued in 1983 alleging fraud and breach of agreement between the parties. Judgment was entered in favor of the defendant. The petitioner then sued in 1985 alleging RICO violations. On page 1523, the Court notes that res judicata bars litigants from relitigating issues which could have been raised in the prior action. This is directly contrary to the implications of the rulings issued in the District Court below. The 11th Circuit goes on to state:

> Although styled as a RICO claim, the complaint relies on the same misconduct by **Ansari** as did the prior suit. This action is barred by res judicata.

Claim and issue preclusion were considered in **HMK Corporation v. Walsey,** 637 Fed. Supp. 710 (District Court of Virginia). There, HMK had first filed a series of suits in State Court. Then, a Federal claim was filed. Next, a Federal claim was filed alleging conspiracy to take property, page 714. It was decided that the traditional concepts of claim preclusion and issue preclusion required dismissal of the RICO claim. Full faith and credit had to be given to the judgment of the Virginia Court, page 716. We are told:

> Final judgment on the merits preclude the parties or their privies from relitigating issues that were or could have been brought in the prior action.

At page 717 the Court notes that there is concurrent jurisdiction over RICO claims in State and Federal Courts. Footnote 5 in the decision notes the legion of cases granting preclusive effects to prior judgments and RICO claims.

Certain of the above cited cases involve claims wherein jurisdiction was based on diversity. However, the decision concerning abstention should be the same in Federal question matters. The litigant cannot be relegated to

State Court on a lesser showing than a plaintiff alleging a Federal question case; **Shomber By Shomber v. Jule Companies, Inc.**, 614 Fed. Supp. 210, 218 (District Court of Illinois).

A proper analysis of these considerations must result in a decision to abstain in the present matter.

There has been no question within either the State or the Federal system concerning the ability of State Courts to litigate claims under 15 U.S.C. 771(2). However, the jurisdictional grant in 15 U.S.C. 78(j) is exclusive. Still, this should not present any difficulty in determining that this case is appropriate for abstention or stay.

The Ninth Circuit confronted this situation in **Weiner v. Shearson,** 521 Fed. 2d 817 (9th Cir. 1975). The District Court had determined that abstention was proper in view of a virtually identical State Court action but had totally dismissed the Federal claim rather than stay. The Court of Appeals felt that total dismissal was improper and that the action should have been stayed pending the outcome of State litigation; page 821. In the course of the decision, a question arose over the ability of the State Court to pass upon claims under the Securities Acts. Those claims presented under Section 77 of Title 15 were no problem. However, claims were also made under 15 U.S.C. Section 78(j) and Rule 10b-5. At page 822, the Court determines that although State Court may not have concurrent jurisdiction over the claims under the 1934 Act, a stay would not be inappropriate. Although the State Court did not have concurrent jurisdiction, it did have jurisdiction over the 1933 Act claims and in ruling on the issues under that provision, it would necessarily resolve the issues in the 1934 Act claim. The same would be true even if State Courts do not have concurrent RICO jurisdiction.

The Second Circuit has reached the same result in **Klein v. Walston,** 432 Fed. 2d 936 (2nd Cir. 1970). Therein, the State Court action involved only claims of common law fraud. Federal claim is brought under the Securities Act of 1934. At page 937 the Court states that the resolution of the State claim issues may well be dispositive of the Federal claims. The fifth Circuit has noted that the great weight of authority is in favor of concurrent jurisdiction over RICO claims in State and Federal Court; **Dubroff v. Dubroff,** 833 Fed. 2d 557 (5th Cir. 1987).

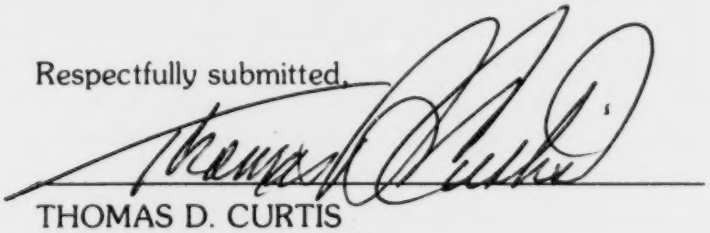
CONCLUSION

When a plaintiff brings a claim in the State Court and actively litigates that claim for seventeen and one-half (17½) months prior to bringing a claim in State Court which has the same underlying basis as the State Court claim, abstention is appropriate. A policy against piecemeal appeals must give way to justice when and interlocutory decision in the District Court finally determines the rights of a party which cannot be adequately addressed on appeal.

This matter falls within that class of case which is appropriate for abstention.

It is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit must be reversed and abstention in this matter must be mandated during the continuaton of the State litigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Original Brief on behalf of Thomas Becnel and The Becnel Company, has this day been placed in the United States Mail, postage prepaid and properly addressed to:

Mr. Richard Stanley
Attorney At Law
546 Corondelet Street
New Orleans, Louisiana 70130

Lafayette, Louisiana this 29th day of July, 1988.

THOMAS D. CURTIS

88-288

FILED
AUG 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES
SUPREME COURT

NO.

STEVEN J. DUPUIS, ET AL

Plaintiff-Appellees

VERSUS

THOMAS R. BECNEL, ET AL

Defendant-Appellant

APPENDIX
FOR WRIT OF CERTIORARI & MANDAMUS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AND THE BECNEL CO.

EXHIBIT A

RULING OF COURT OF APPEALS

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

APR 6 1988

GILBERT F. GANUCHEAU
CLERK

No. 88-9017
USDC No. 87-1781-0

STEVEN DUPUIS, ET AL.,

Plaintiff-Appellee,

versus

THE BECNEL COMPANY, ET AL.,

Defendants-Appellants

Petition for Leave to Appeal an
Interlocutory Order or in the
Alternative for a Writ of Mandamus

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition of the Becnel Company for leave to appeal the interlocutory order or in the alternative a writ of mandamus is DENIED. Becnel seeks relief from the district court's denial of its motion requesting that the district court abstain from or stay the litigation. Becnel has not overcome this court's policy against piecemeal appeals. Clark-Dietz & Associates-Engineers, Inc. v. Basic Construction Co., 702 F.2d 67, 69 (5th Cir. 1983). Becnel has not established that the resolution of the question presented would materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Becnel has not submitted any argument to justify the issuance of a writ of mandamus.

Accordingly, the motion of defendants Thomas Becnel and The Becnel Company to abstain or stay is hereby DENIED.

Opelousas, Louisiana, January 7, 1988.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

EXHIBIT B

1ST COURT RULING

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

STEVEN J. DUPUIS, ET AL
VS. **CIVIL ACTION NUMBER 87-1781**
THOMAS R. BECNEL, ET AL **SECTION O - JUDGE SHAW**

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
JAN 8 1988
ROBERT H. SHEMWELL, CLERK
BY RW
DEPUTY

RULING

Now before the court is the motion of defendants Thomas Becnel and The Becnel Company for this court to abstain from hearing this matter or stay the matter pending the resolution of a "virtually identical claim" brought by plaintiffs in state court. Defendants argue that "substantial progress" has been made in the state court action, and that this court should await the state court's resolution of the issues before this court entertains the case.

The court disagrees with defendants' reasoning. Unlike the claim in state court, the claim presently before the court is based upon RICO. Therefore, the issues in the two cases are substantially different, and it would in no way serve the interests of the parties were this court to abstain or stay its hearing of the present case.

Accordingly, the motion of The Becnel Company and Thomas R. Becnel for a new trial is hereby DENIED.

Opelousas, Louisiana, January 25, 1988.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

EXHIBIT C

DENIAL OF NEW TRIAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

STEVEN J. DUPUIS, ET AL
VS.
THOMAS R. BECNEL, ET AL

CIVIL ACTION NUMBER 87-1781
SECTION O - JUDGE SHAW

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
JAN 25 1988
ROBERT H. SHEMWELL, CLERK
BY DG
DEPUTY

RULING

Now before the court is the motion of The Becnel Company and Thomas R. Becnel for a new trial, requesting that this court reconsider its ruling of January 8, 1988, wherein the court denied defendants' motion for abstention or stay.

Defendants argue that the court was mistaken in its ruling that the issues in the state court claims and the issues in the federal court claims are substantially different, as the federal court claim is based upon RICO. The court disagrees with defendants' contentions. Although both the state and the federal court claims are based upon similar underlying transactions, the federal court claims are founded exclusively upon RICO, a federal statute with entirely different elements than state law breach of contact allegations.

Accordingly, the motion of The Becnel Company and Thomas R. Becnel for a new trial is hereby DENIED.

Opelousas, Louisiana, January 25, 1988.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

EXHIBIT D

DENIAL OF REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-9017

STEVEN DUPUIS, ET AL.,
Plaintiffs-Respondents,
versus
THE BECNEL COMPANY, ET AL.,
Defendants-Petitioners.

U. S. COURT OF APPEALS
FILED
MAY 3 1988
GILBERT F. GANUCHEAU
CLERK

Petition for Leave to Appeal an
Interlocutory Order or in the
Alternative for a Writ of Mandamus

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of this Court's order of April 6, 1988 denying permission for leave to appeal the interlocutory order or in the alternative a writ of mandus is denied.

EXHIBIT E

STATE PETITION

DIV. "J"

STEVEN J. DUPUIS, SR., ET AL : 15TH JUDICIAL DISTRICT COURT

VERSUS : DOCKET NUMBER: 85-8457

THE BECNEL COMPANY (formerly known as SBS BUILDING CORPORATION), ET AL : LAFAYETTE PARISH, LOUISIANA

. . . . . .

PETITION

The joint petition of STEVEN J. DUPUIS, SR., a person of the full age of majority and a resident of and domiciled in the Parish of Lafayette, Louisiana; STEVEN J. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, a legal entity pursuant to the Laws of the State of Louisiana; JAMES H. DUPUIS, SR., a person of the full age of majority and a resident of and domiciled in the Parish of Lafayette, Louisiana; JAMES H. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, a legal entity pursuant to the Laws of the State of Louisiana; JOHN W. DUPUIS, III, a person of the full age of majority and a resident of and domiciled in the Parish of Sabine, Louisiana; and JOHN W. DUPUIS, IV IRREVOCABLE INTER VIVOS TRUST, a legal entity pursuant to the Laws of the State of Louisiana, petitioners, with respect represent:

I.

Made defendant herein are:

1. THE BECNEL COMPANY, a Louisiana Corporation formerly known as SBS BUILDING CORPORATION, which said corporation is domiciled in Lafayette Parish, Louisiana;

2. SBS-RUE BIENVILLE 1981 VENTURE, A LOUISIANA PARTNERSHIP IN COMMENDAM, formed on June 22, 1981, and filed of record with the Louisiana Secretary of State and the Lafayette Parish Clerk of Court under File No. 81-019777 of the records of Lafayette Parish Louisiana;

3. THOMAS R. BECNEL, a person of the full age of majority and a resident of and domiciled in Lafayette Parish, Louisiana;

4. JOHN D. PRICE, a person of the full age of majority and a resident of and domiciled in Lafayette Parish, Louisiana;

5. BRIT BUSCH, a person of the full age of majority and a resident of and domiciled in Lafayette Parish, Louisiana;

6. MANNING F. BILLEAUD, a person of the full age of majority and a resident of and domiciled in Lafayette Parish, Louisiana.

II.

The aforedescribed defendants are liable jointly, severally and in solido for all relief sought herein, all as is hereinafter set forth.

III.

The Becnel Company, as the general and/or managing partner is liable for all relief sought herein for all reasons hereinafter set forth including, but not limited to, its willful misconduct, gross negligence, and/or intentional breach of contractual, legal, and/or fiduciary obligations owed to petitioners.

IV.

Thomas R. Becnel, as sole shareholder and as an officer and/or director of The Becnel Company, formerly known as SBS Building Corporation, which corporation is the general and managing partner of SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, is liable in solido with his corporation, The Becnel Company, for all relief sought herein because of his personal actions and concerted involvement in perpetrating the willful misconduct, gross negligence, intentional breach of contractual, legal and/or fiduciary obligations, deceit, false representations, artifice and/or concealment as hereinafter set forth, through his corporation, The Becnel Company. Furthermore, the said Thomas R. Becnel, is liable with The Becnel Company in solido, under the theory that the said Becnel Company is merely the alter ego of Thomas R. Becnel such that Thomas R. Becnel is liable in solido with The Becnel Company for all relief hereinafter set forth.

V.

Defendants, John D. Price, Brit Busch, Manning F. Billeaud, and Thomas R. Becnel are partners in commendam in the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam and, as such, are indispensable parties to this litigation. Because of said defendants' contractual relationship with petitioners herein and because of the effect that the granting of the relief herein sought will have, said defendants must be cited and named as defendants herein and are necessary and indispensable parties to this litigation such that there may not be a complete and equitable adjudication of the controversy sub judice unless said defendants are joined in this action.

VI.

Your defendant, SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam is, likewise, liable to petitioners herein for all relief sought. As such, said partnership is an indispensable party defendant to these proceedings and must be cited and is necessary and indispensable such that there will be a complete and equitable adjudication of this controversy and litigation.

VII.

Petitioners (sometimes hereinafter collectively referred to as the "Dupuis Interest") are damaged and continue to suffer damages as a result of the willful misconduct, gross negligence, intentional breach of fiduciary, legal and/or contractual obligations, deceit, false representations, artifice and/or

concealment as well as other transgressions of law perpetrated by the defendants, Thomas R. Becnel and/or The Becnel Company, all of which entitle them to the relief herein sought.

VIII.

Defendants, Thomas R. Becnel and/or The Becnel Company, through a concerted course of action and through their acts and omissions have violated federal and state laws and have breached fiduciary, contractual and/or legal duties owed to your petitioners, to the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, itself, and to the other party-litigants. These commissions and/or omissions can be generally described in the following non-exclusive particulars:

(a) Acting singly and/or in concert, directly and/or indirectly, and aiding and abetting one another to induce petitioners to enter into the partnership on or about June 22, 1981 by intentionally making false and/or misleading statements to the petitioners concerning this transaction and the contributions to be made by Thomas R. Becnel and/or The Becnel Company in this partnership;

(b) In continuation of this device, scheme and/or artifice to deceive, Thomas R. Becnel and/or The Becnel Company made further false and/or misleading statements to petitioners concerning his and/or its activities and contributions to the partnership, the financial gain to be derived by him and/or it or entities related to them from the partnership, as well as the financial condition and business of the partnership, all upon which petitioners relied to their detriment;

(c) By virtue of such false and/or misleading statements, and additional misrepresentations made in regards to the partnership and the activities of Thomas R. Becnel and/or The Becnel Company and/or entities related to and controlled by the said Thomas R. Becnel and/or The Becnel Company, these defendants induced petitioners to enter into the partnership and to remain as partners therein occasioning your petitioners to incur severe losses and sustain damages as hereinafter set forth.

IX.

Petitioners seek the following relief:

(a) To have all improperly paid, non-substantiated, misapplied and/or unauthorized funds which have been paid by the partnership, Thomas R. Becnel and/or The Becnel Company, returned to the partnership and distributed to the partners as a distribution and/or placed on deposit as an asset of the partnership and/or paid in reduction of the mortgage obligation of the partnership, with said reclaimed and returned funds to bear interest from the date of their payment and, in lieu of the reclamation and return of said funds, judgment against Thomas R. Becnel and/or The Becnel Company and/or SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam for said amounts, together with interest from the date of their payment and/or in lieu thereof legal interest at the

highest permissable rate, together with reasonable attorney's fees and all cost associated therewith;

(b) Because of the innate conflict of Thomas R. Becnel and/or The Becnel Company with the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam and with your petitioners herein, and further, because of the past actions of Thomas R. Becnel and/or The Becnel Company and his and/or its willful misconduct, gross negligence, deceit, artifice, and/or intentional breaches of duty, law and contract, to have this Honorable Court appoint a special master, liquidator, conservator, and/or commissioner to function as managing partner of the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam presently and until judgment herein is rendered and that said special master, expert, and/or officer of this Court, pro tempore, have his fees taxed as court cost herein;

(c) Because of the complexity and exceptional circumstances surrounding the partnership subject to this litigation, the lack of adequate and/or verifiable accounting and financial information concerning the affairs of said partnership, as will hereinafter be explained, the intentional failure of the general partner and/or Thomas R. Becnel to produce records of the partnership upon request, there should be a full and accurate valuation of the partnerhsip and an accounting for assets of the partnership by a special master, expert and/or officer of the Court, pro tempore, appointed for these purposes, whose fees should be taxed as court cost herein;

(d) That subsequent to the return of all reclaimable funds which have been improperly paid and/or misapplied and which funds are to be returned to the partnership, there be judgment herein authorizing and ordering that the Dupuis Interest be allowed to withdraw without the consent of the partners and prior to the expiration of the term of the partnership because of just cause arising out of the failure of The Becnel Company and/or Thomas R. Becnel to perform certain obligations as herein set forth;

(e) That petitioners, as former partners, be entitled to an amount equal to the value of their share of the partnership, together with legal interest from date of judicial demand plus reasonable attorney's fees, which amount should be fixed at a sum not less than ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 ($1,500,000.00) DOLLARS, pursuant to the valuation and rights of preferential distribution set forth in the articles of partnership and as substantiated by the valuation of the partnership;

(f) An award of all other damages to petitioners herein, which they have suffered and may prove at trial, such as but not limited to the loss of use of funds, treble and/or punitive damages, penalty interest, and all attorney's fees and cost incurred in the prosecution of this litigation;

(g) Alternatively that the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam be dissolved and liquidated, and pursuant

to said dissolution and/or liquidation that there be a liquidator appointed, that the said liquidator seek reimbursement and reclamation of all funds due to the partnership, that said funds be returned to the partnership, that there be a valuation of the partnership and that upon dissolution and/or liquidation, your petitioners receive herein the valuation and rights of preferential distribution as is set forth in the articles of partnership and as is substantiated by the valuation of the partnership, which amount should be not less than ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 ($1,500,000.00) DOLLARS, together with legal interest from date of judicial demand until paid, and all attorney fees and cost incurred in the prosecution of this litigation, which attorney fees and cost should be taxed as cost of court and/or expenses of the liquidation and/or dissolution.

X.

During calendar year 1980, petitioners were solicited by Thomas R. Becnel to enter into certain real estate transactions with him. One of these proposed transactions culminated in petitioners forming, with Thomas R. Becnel and his company, SBS Building Corporation, which is now known as The Becnel Company, the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam.

XI.

In soliciting the petitioners herein, Thomas R. Becnel, on numerous occasions, assured petitioners and had them believe that he had the know-how and experience to develop, construct, lease-out and manage a commercial office building. These abilities of Thomas R. Becnel and/or his company, SBS Building Corporation, were to be the contribution made to the proposed partnership in return for the partnership interest to be accorded to Thomas R. Becnel and/or the SBS Building Corporation in said partnership.

XII.

Conversely, the contribution to be made and actually made by petitioners herein was deeding of all of their rights, title and interest in and to approximately 3.6 acres of immovable property to the newly formed partnership which property was used as collateral to borrow funds to construct a commercial office building thereon. In return for the conveyance of the immovable property to the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, petitioners received their interest in said partnership as well as a right of preferential distribution on the basis of $7.50 per square foot of real estate upon the sale, dissolution, withdrawal or other disposition as to the partnership.

XIII.

Petitioners fulfilled their agreement and have made their contributions as intended by the parties to the partnership. Thomas R. Becnel and/or The Becnel Company, however, have not done so despite the inducement of

Thomas R. Becnel to petitioners as aforedescribed. The obligations as to contributions and duties of the partners are as are more specifically set forth in the articles of partnership which are attached hereto and made a part thereof after having been identified as "Petitioners' Exhibit A".

XIV.

In order to persuade petitioners to enter into the partnership with him, Thomas R. Becnel prepared and/or had prepared projections and/or pro formas of cost and operating expenses which were given to petitioner as inducements and representations to substantiate the profitability associated with the proposed partnership.

XV.

None of the projections and/or pro formas provided for the payment of management and/or leasing and/or commitment fees to Thomas R. Becnel and/or The Becnel Company and/or companies or entities related to these defendants. Further, said projections and pro formas reflect annual spendable income of approximately TWO HUNDRED THIRTY FOUR THOUSAND AND NO/100 ($234,000.00) DOLLARS.

XVI.

Based on the claims, assertions, assurances, projections and/or pro formas as well as the representations of Thomas R. Becnel, petitioners entered into the parthership known and designated as SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, on or about June 22, 1981.

XVII.

As is shown in the articles of partnership, the principal business to be engaged in by the partnership is the ownership, planning, development, management, operation, leasing and sale of immovable property, as developed with the commercial office building, which property was conveyed to the partnership by petitioners herein.

XVIII.

SBS Building Corporation, now known as The Becnel Company, was and is the general and managing partner of the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam.

XIX.

Petitioners herein have honored their agreement and have made and contributed their capital contribution to the partnership all as is set forth in the articles of partnership. Defendants, Thomas R. Becnel and/or The Becnel Company have not done so, have not paid the recited capital contribution into the partnership, and, additionally, have not provided the leasing services and management services as to the commercial office building as is stipulated to be a part of their capital contribution but have caused the parthership to pay

exorbitant and excessive sums for leasing and management fees to entities owned by and/or controlled by Thomas R. Becnel and/or The Becnel Company.

XX.

Defendants, Thomas R. Becnel and/or The Becnel Company by paying and/or causing these improper and misapplied leasing and management fees to be paid to themselves and/or to entities which they control, have deprived petitioners of distributions of disposable earnings. Alternatively, the said Thomas R. Becnel and/or The Becnel Company have intentionally failed to make any distributions to the partnership of disposable income in an effort to exert economic pressure on the partnership and/or petitioners herein as a ploy to gain economic advantage over said petitioners.

XXI.

Upon information and belief, petitioners aver that Thomas R. Becnel and/or The Becnel Company have willfully, intentionally, and/or negligently breached the articles of partnership, as well as their contractual, legal and/or fiduciary obligations to and in favor of petitioners in the following non-exclusive particulars:

(a) Failure to maintain the principal office and place of business of the partnership at 120 Exchange Place, Lafayette, Louisiana, and/or failure to designate by notice to the partners in commendam any change of principal place of business.

(b) Failure to file a duplicate original of the articles of partnership with the Louisiana Secretary of State for registry in the Central Registry for Contracts of Parthership within five (5) days of June 22, 1981.

(c) Failure to pay or cause to have paid by the general partner the capital contribution of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS.

(d) Failure of the general partner to make or to cause to have made, as contribution to the partnership, non-compensated know-how and experience in the development, construction, leasing-out, and management of the commercial office building built upon the immovable property deeded to the partnership by petitioners herein.

(e) Failure of Thomas R. Becnel to pay and/or to cause to be paid the sum of ONE HUNDRED AND NO/100 ($100.00) DOLLARS as his contribution to the partnership.

(f) Failure of Thomas R. Becnel to make or to have made, as his contribution to the partnership, the conveyance of any of his interest in various plans, building contracts, loan commitments and options to the property.

(g) Failure by the general partner to expend partnership funds solely for the purposes of the partnership and the knowing expenditure of partnership funds, by the general partner, for purposes and obligations not authorized by the partnership agreement.

(h) Allowing and/or causing the partnership to enter into contracts with entities affiliated with and/or controlled by Thomas R. Becnel and/or The Becnel Company for the purposes of leasing and management of the

partnership project, in contravention to the provisions of the articles of partnership, and without authorization and necessity for said contracts; and, further, causing said related and/or controlled entities to be paid clearly exorbitant, improper and impermissible fees by the partnership, all to the detriment of the partnership and to your petitioners herein.

(i) Alternatively, causing the partnership to enter into leasing and/or management agreements with entities affiliated and/or controlled by Thomas R. Becnel and/or The Becnel Company under terms and conditions that are inconsistent with industry standards in the locale for such agreements, contracts, and/or obligations and all in derogation of the articles of partnership and to the detriment of the partnership and to your petitioners herein.

(j) Causing to have paid fees and/or sums to affiliated and controlled entities and/or individuals of Thomas R. Becnel and/or The Becnel Company which fees and/or sums are improper, impermissible, do not serve the purpose and benefit of the partnership and which are in violaton of the articles of partnership and which are to the detriment of the partnership as well as to your petitioners herein.

(k) Failure to have the partnership books kept at the principal place of business of the partnership of such other place as is designated.

(l) Intentional actions and/or gross negligence and/or failure on the part of Thomas R. Becnel and/or The Becnel Company in not allowing petitioners to receive an accounting of the partnership affairs.

(m) Intentional and/or negligent comingling, by Thomas R. Becnel and/or The Becnel Company or caused by Thomas R. Becnel and/or The Becnel Company, of partnership assets and funds with assets and funds belonging to other entities and/or individuals.

(n) Intentional and/or negligent payment of non-partnership obligations with and by funds of the partnership.

(o) Failure to allow petitioners the free access to and the right to inspect and copy the books of account and books of the partnership, despite repeated and numerous requests to be allowed to examine said books. Copies of said requests are documented by copies of the correspondence which are attached hereto and made a part hereof after having been identified as "Petitioners' Exhibit B".

(p) Intentional and/or negligent failure by The Becnel Company and/or Thomas R. Becnel to provide an annual partnership financial statement, including a balance sheet and income statement to the partners within sixty (60) days after the close of each year as well as the failure to furnish income tax information required for the partners in the filing of their federal and state income tax returns to the partners within seventy five (75) days of the close of the partnership's taxable year.

(q) Admission of new partners in commendam in violation of and/or derogation of the articles of partnership in commendam.

(r) The assignment, transfer and/or sale of a portion of the partnership interest of Thomas R. Becnel in violation and/or derogation of the articles of partnership.

(s) Intentional and/or negligent payment, by The Becnel Company and/or

Thomas R. Becnel, of leasing fees, management fees, and commitment fees, improperly and without justification and in violation and/or derogation of the articles of partnership, which fees and sums were paid to entities related and/or owned by Thomas R. Becnel and/or The Becnel Company and which improper and impermissible payments exceed the sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

(t) In making payments to entities and/or individuals related to Thomas R. Becnel and/or The Becnel Company for services not associated with, rendered to, and/or not needed by the partnership under guise of donations, and/or pest control and extermination and/or aircraft cost.

(u) Other violations of the fiduciary, contractual, and/or legal obligations of The Becnel Company and/or Thomas R. Becnel to the partnership and to your petitioners herein as will be shown upon the trial on the merits of this matter.

XXII.

Upon information and belief, petitioners aver that The Becnel Company and/or Thomas R. Becnel have engaged in a course of conduct which materially benefits themselves or entities which they own and/or control inasmuch as said related individuals and/or entities have received unauthorized and impermissible compensation in derogation of the articles of partnership and the fiduciary obligations of the general partner. Furthermore, the said general partner, The Becnel Company and/or Thomas R. Becnel, did not divulge the conflicts of interest which they have in their various capacities and as they relate to the partnership and/or to the partners therein, and, accordingly have breached their obligations to the petitioners by failing to adequately advise the petitioners of such conflicts.

XXIII.

Upon information and belief, petitioners aver that the general partner, The Becnel Company and/or Thomas R. Becnel, have negligently managed the affairs of the partnership, have authorized expenditures of funds from the partnership for services, equipment and/or repairs that were not justified and were not for the economical benefit and advantage of the partnership and, furthermore, have further violated their duties owed to the partnership and to petitioners, as partners in commendam.

XXIV.

Petitioners, on numerous occasions, have made demand upon the general partner, The Becnel Company and/or Thomas R. Becnel, for explanations and accountings as to the partnership which demands have never been fully and adequately answered and responded to. Accordingly, the defendants have breached their fiduciary duties and obligations to petitioners and continue to breach their fiduciary duties. As a result of the foregoing, petitioners aver that the actions of The Becnel Company and/or Thomas R. Becnel constitute breaches of contract, breaches of duties owed as a mandatory, agent and general partner, constitute mismanagement, willful

misconduct, gross negligence and/or intentional breaches, all of which have caused direct and substantial damage to the petitioners for which they are entitled to compensation and the relief herein prayed for.

XXV.

Additionally, the actions of said defendants, Thomas R. Becnel and/or The Becnel Company, constitute just cause authorizing petitioners to withdraw without the consent of the other partners prior to the expiration of the term of the partnership and to have said petitioners receive payment for the value of their interest in the partnership in the amount determined to be due them, together with legal interest thereon from date of judicial demand until paid, as well as all attorney's fees and cost associated with these proceedings. This relief is authorized and provided for by articles of the Louisiana Civil Code, such as but not limited to Article 2821.

XXVI.

Alternatively, the actions of Thomas R. Becnel and/or The Becnel Company are just cause for and/or pose the impossibility of obtaining the object of the partnership and, as such, are cause for the termination and dissolution of the partnership as is provided for by articles of the Louisiana Civil Code, such as but not limited to Article 2826.

XXVII.

Upon information and belief, petitioners aver that all representations made to them by Thomas R. Becnel and/or The Becnel Company have been made for the purpose of deceit and/or were made with a mental state embracing an attempt to deceive, manipulate, and/or deprive petitioners of their interest and property and that said defendants knew the falsity of said misrepresentations of material facts and, yet, have acted singly and/or in concert with, directly and/or indirectly, and aided and abetted and were aided and abetted one to the other, in this course of action, all to the detriment of petitioners and occasioning damages to petitioners as set forth herein.

XXVIII.

Petitioners aver that the disclosure of the omitted information and/or the accurate portrayal of the misinformation depicted, received and communitated to them by Thomas R. Becnel, would have dissuaded them from entering into this partnership and that said misrepresentations and inaccuracies were a material inducement to petitioners to enter into the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam. Accordingly, petitioners specifically plead their detrimental reliance upon the actions of Thomas R. Becnel and/or The Becnel Company.

XXIX.

Upon information and belief, petitioners aver that defendants, Thomas R. Becnel and/or The Becnel Company, acted singly and/or in concert, directly and/or indirectly, aiding and abetting one another, using means and

instrumentalities, and with a mental state embracing an attempt to deceive, manipulate and/or deprive petitioners, and further participated in this device, scheme or artifice to deceive, manipulate and/or deprive petitioners and obtained property and assets from petitioners by means of untrue statements of material facts and omissions to state material facts necessary to make the statements understood and in light of the circumstances under which they were made, makes said statements misleading. Said defendatns possessed an actual or general awareness of their roll in this improper activity and knowingly undertook this activity. Further, said defendants were active and knowing participants in the various conflicts of interest and concealments of material facts as enumerated in this petition.

XXX.

As a result of the acts and omissions of Thomas R. Becnel and/or The Becnel Company, said defendants are liable to petitioners for all relief herein sought; for the loss of investment income during the period of June 22, 1981, to the date of judgment to be rendered herein; for the loss of tax benefits from alternative investments which may have been at petitioners' disposal; for legal interest from date of June 22, 1981, through the date of judgment herein and until paid, as well as for an accounting and such other damages as petitioners may prove at trial, together with reasonable attorney's fees and all cost of these proceedings.

XXXI.

Upon information and belief, defendants Thomas R. Becnel and/or The Becnel Company in their actions, as aforedescribed, acted singly and/or in concert, directly and/or indirectly, and communicated offers to sell from within the State of Louisiana a security, as defined as the Louisiana Blue Sky Law (Louisiana Revised Statute 51:701 et seq, as amended) to petitioners by means of untrue statements of material facts or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made not misleading and, thereby, violated Louisiana Revised Statute 51:715 et seq. Petitioners did not know of these untruths or omissions. Defendants, Thomas R. Becnel and/or The Becnel Company, knew or in the exercise of reasonable care could have known of these untruths or omissions.

XXXII.

Thomas R. Becnel, individually and as an officer, director and/or stockholder in The Becnel Company was a material aider and abetter in the transactions in question and is liable under Louisiana Revised Statute 51:715 (b) jointly, severally, and in solido with and to the same extent as that The Becnel Company is to petitioners. As a proximate result of defendants' violations of Louisiana Revised Statute 51:715 (a)(3) and/or (b), petitioners incurred the damages detailed herein and said defendants are liable to petitioners for the consideration paid for the security, namely, to-wit, the sum of $7.50 per square foot of immovable property placed into the partnership,

together with interest at the rate of six percent (6%) per year on said amount, from June 22, 1981, to the date of payment, together with all cost of these proceedings and reasonable attorney's fees. Petitioners aver that they have made tender of their interest in the security to defendants, Thomas R. Becnel and/or The Becnel Company, who have refused the tender and the reimbursement to petitioners for all sums due. Copies of said tenders are attached hereto and made a part hereof after being identified as "Petitioners' Exhibit C".

XXXIII.

Upon information and belief, defendants Thomas R. Becnel and/or The Becnel Company acting singly and/or in concert, directly and/or indirectly, violated and/or aided and abetted each others violation of Louisiana Revised Statute 51:1405 et seq by using and employing unfair and deceptive methods, acts and practices declared unlawful by Louisiana Revised Statute 51:1401 et seq. Said defendants' unfair and deceptive methods, acts and practices are as is described and detailed in this petition.

XXXIV.

As a result of the use and employment by Thomas R. Becnel and/or The Becnel Company of these unfair and deceptive methods, acts and practices declared unlawful by Louisiana Revised Statute 51:1401 et seq, petitioners have suffered damages as are itemized in this petition. Accordingly, said defendants Thomas R. Becnel and/or The Becnel Company are liable, jointly, severally, and in solido, for such losses sustained by the petitioners together with treble damages, legal interest, reasonable attorney's fees and all cost of these proceedings.

XXXV.

Upon information and belief, and for the reasons as are herein set forth, as a proximate result of Thomas R. Becnel and/or The Becnel Company's acts, negligence, imprudence and want of skill, petitioners have suffered loss and damages for which defendants are liable, in solido, under Louisiana Civil Code Articles 2315, 2316, and 2324. Additionally, upon information and belief, Thomas R. Becnel and/or The Becnel Company are liable under Civil Code Article 2317 and 2320 for the damages to petitioners occasioned by the preventable acts of persons for whom they are answerable and other things which they had in their custody.

XXXVI.

Upon information and belief, and at all relevant times, petitioners were induced by untrue statements and material omissions by defendants, Thomas R. Becnel and/or The Becnel Company, bearing on the contract of partnership. Said defendants, Thomas R. Becnel and/or The Becnel Company made these untrue statements and material omissions with the intention of inducing petitioners to enter into said partnership and said defendants knew that the representations were untrue and contained material omissions.

XXXVII.

As a result of these untrue statements and/or material omissions, petitioners are entitled, under Louisiana Civil Code Article 1847, to the rescission of the transaction, to the return of the capital contribution made by them to the partnership, together with all damages detailed and specified in this petition such as but not limited to interest from the date of the contribution and/or legal interest, punitive and/or treble damages, reasonable attorney's fees and all cost of these proceedings.

XXXVIII.

Upon information and belief, Thomas R. Becnel and/or The Becnel Company, as managing partner and as a mandatary of petitioners have and have had general and express duties owed to petitioners such as but not limited to the furnishing of all appropriate information, the obligation to communicate and not withhold material facts from the petitioners, the full and accurate evaluation of the partnership. Despite these duties and obligations, your defendants Thomas R. Becnel and/or The Becnel Company have breached the general and specific duties of reasonable care owed to petitioners thereby causing damages to petitioners as is set forth herein all in violation of Louisiana Civil Code Articles 2315, 2316, 3003, and 3004. In addition to seeking recovery for all losses sustained, petitioners demand, pursuant to Article 3004 of the Louisiana Civil Code, an accounting by Thomas R. Becnel and/or The Becnel Company of their managment.

XXXIX.

Upon information and belief, Thomas R. Becnel and/or The Becnel Company have occupied a position of special trust and confidence as general and managing partner herein. Said defendants were obligated to act with utmost honesty and good faith in dealing with petitioners and to exercise reasonable care to protect petitioners' interest. By virtue of the acts and omissions described herein, Thomas R. Becnel and/or The Becnel Company have breached their fiduciary duty owed to the petitioners occasioning petitioners to suffer all damages as are set forth and itemized herein.

XL.

Accordingly, petitioners are entitled to seek and have recovery for those losses occasioned by them because of Thomas R. Becnel's and/or The Becnel Company's breach of the fiduciary duties owed and imposed under Louisiana Civil Code Articles 1847, 3016, and 3018.

XLI.

Upon information and belief, Thomas R. Becnel is the sole owner and is an officer and director of The Becnel Company. The said Becnel Company has not discharged its duties in its position of good faith and did not discharge said duties with diligence, care, and steadfast skill which ordinarily prudent men would exercise under similar circumstances and like positions. Furthermore, Thomas R. Becnel did not discharge his duties owed to the

other partners and to your petitioners herein in good faith and did not undertake and discharge said duties with diligence, care, and steadfast skill which ordinarily prudent men would exercise under similar circumstances and like positions.

XLII.

This breach of the fiduciary duty of The Becnel Company and/or its sole owner, officer and director Thomas R. Becnel violated Louisiana Revised Statute 12:91 and 12:95 and petitioners suffered the damages as are detailed and itemized herein. Said defendants, accordingly, are liable jointly, severally, and in solido for all losses sustained by petitioners herein.

XLIII.

Because of the actions of Thomas R. Becnel as herein set forth which are violative of Louisiana Revised Statute 12:95 and because of his deceitful practices, artifice, false representations and/or concealment, the said Thomas R. Becnel, as promotor, shareholder, director and officer of The Becnel Company is liable, in solido, with The Becnel Company for all damages sustained by petitioners as itemized and set forth herein.

XLIV.

That petitioners are entitled to have Thomas R. Becnel and/or The Becnel Company show cause on a day and date to be fixed by this Honorable Court why the temporary relief sought herein should not be granted any why the Court should not appoint a special master and an expert to serve at the direction of the Court and until further order of this Court.

WHEREFORE, petitioners, STEVEN J. DUPUIS, SR., STEVEN J. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, JAMES H. DUPUIS, SR., JAMES H. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, JOHN W. DUPUIS, III and JOHN W. DUPUIS, IV IRREVOCABLE INTER VIVOS TRUST pray:

(1) That all defendants be duly cited and served with these pleadings and ordered to appear and answer the same;

(2) That after due proceedings had there be judgment herein in favor or your petitioners and against your defendants THOMAS R. BECNEL and/or THE BECNEL COMPANY, ordering all improperly paid, non-substantiated and/or misapplied funds and sums to be returned to the partnership and distributed to the partners as a distribution and/or placed on deposit as an asset of the partnership and/or paid in reduction of the mortgage obligation of the partnership with said returned and reclaimed funds bearing interest from the date of their improper payment and in lieu of the return and reclamation of said funds that there be judgment against Thomas R. Becnel and/or The Becnel Company for said amounts together with interest from the date of payment of said funds or in lieu thereof, legal interest at the highest rate, together with attorney's fees and all costs associated therewith.

(3) That because of the innate conflict of Thomas R. Becnel and/or The Becnel Company and because of the actions of said Thomas R. Becnel and/or The Becnel Company as described in this petition, the Honorable Court should appoint a special master, liquidator, conservator and/or commissioner to function as managing partner of the partnership presently and until judgment herein is rendered and that said special master and/or officer of the Court, pro tempore, have his fees taxed as court cost herein;

(4) That because of the complexity and exceptional circumstances surrounding the partnership, the lack of adequate and verifiable accounting and financial information concerning the affairs of the partnership as set forth in the petition as well as the intentional failures of the general partner and/or Thomas R. Becnel to produce records of the partnership upon request, there should be a full and accurate valuation of the partnership and accounting for assets of the partnership by a special master, expert, or officer of the Court, pro tempore, appointed for these purposes, whose fees should be taxed as court costs herein;

(5) That subsequent to the return of the funds due the partnership, that there be judgment herein authorizing and ordering that the petitioners be allowed to withdraw from the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, without the consent of the partners and prior to the expiration of the term because of just cause arising out of the failure of the Becnel Company and/or Thomas R. Becnel to perform certain obligations as alleged in the petition;

(6) That petitioners, as former partners, be entitled to and recieve judgment for an amount equal to the value of their shares in the partnership, together with legal interest from date of demand and which share should be fixed at a sum not less than ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 ($1,500,000.00) DOLLARS, pursuant to the valuation and rights of preferential distribution set forth in the articles of partnership and as substantiated by the valuation of the partnership and that said preferential rights of distribution in the partnership be recognized and applied herein;

(7) That an award of all other damages to petitioners herein which they have suffered and which they may prove at trial such as but not limited to the loss of use of funds, treble damages, punitive damages, penalty interest, reasonable attorney's fees, and all cost of court herein be awarded;

(8) Alternatively, that SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, be dissolved and liquidated, and pursuant thereto that a liquidator be appointed, that said liquidator seek reimbursement of all funds due to the partnership, that said funds be returned to the partnership, that there be a valuation of the partnership and that upon dissolution petitioners receive herein the valuation and right of preferential distribution as is set forth in the articles of partnership and as is substantiated by the valuation of the

partnership which said sums due to petitioners should be not less than ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 ($1,500,000.00) DOLLARS, together with legal interest thereon from date of judicial demand, together with all attorney's fees and cost incurred herein by this litigation which attorney's fees and cost should be taxed as court cost and/or expenses of the liquidation;

(9) That there be judgment herein in favor of petitioners and against defendants THOMAS R. BECNEL and/or THE BECNEL COMPANY for all damages associated with the loss of investment income during the period of June 22, 1981 to the date of judgment, the loss of tax benefits from alternative investments which may have been at petitioners' disposal, judgment for legal interest from June 22, 1981, and such other damages as petitioners may prove at trial, together with reasonable attorney's fees and all cost of these proceedings;

(10) That there be judgment against THOMAS R. BECNEL and/or THE BECNEL COMPANY recognizing the violation of said defendants of Louisiana Revised Statute 51:701 et seq, as amended, and holding said defendants to be liable, jointly, severally, and in solido, to petitioners for all damages sustained by petitioners herein, namely the sum of SEVEN AND 50/100 ($7.50) DOLLARS per square foot of immovable property placed into the SBS-Rue Bienville 1981 Venture, A Louisiana Partnership In Commendam, together with interest at the rate of six percent (6%) per annum until paid, from June 22, 1981, on said sum, plus reasonable attorney's fees and all cost of these proceedings.

(11) That there be judgment against THOMAS R. BECNEL and/or THE BECNEL COMPANY recognizing that said defendants have violated Louisiana Revised Statute 51:1405 et seq and awarding judgment to petitioners against said defendants jointly, severally, and in solido for all damages occasioned to petitioners together with treble damages, reasonable attorney's fees and all cost incurred;

(12) That there be judgment herein against defendants THOMAS R. BECNEL and/or THE BECNEL COMPANY recognizing the liability of said defendants under Louisiana Civil Code Articles 2315, 2316, 2324, 2317, 2320, 3003, and 3004, and awarding to petitioners all damages occasioned and sustained, legal interest from date of judicial demand as well as reasonable attorney's fees and all cost of these proceedings;

(13) That there be judgment against all defendants recognizing the right of petitioners to a rescission of the partnership and to a return of their capital contribution made to them or in lieu thereof the monitary value for said contribution, together with all damages sustained, legal interest or penalty interest from the date of said contribution, reasonable attorney's fees and all cost of these proceedings;

(14) That there be judgment against defendants THOMAS R. BECNEL and/or THE BECNEL COMPANY recognizing said defendants' breach of their fiduciary duties owed and imposed under Louisiana Civil Code Articles 1847, 3016, and 3018, and awarding to petitioners,

all damages sustained, together with legal interest from date of judicial demand until paid, reasonable attorney's fees and all cost of these proceedings;

(15) That there be judgment against THOMAS R. BECNEL, in solido with THE BECNEL COMPANY, for all relief awarded herein, and for all damages sustained by petitioners herein;

(16) That there be judgment herein in favor of petitioners, and against all defendants, awarding to petitioners all relief requested, as it pertains to each defendant;

(17) That all defendants be ordered to show cause on a day and at an hour to be fixed by this Court why this Honorable Court should not appoint a special master, liquidator, conservator, and/or commissioner to function as managing partner of the partnership presently and until judgment herein is rendered and that the said special master, expert and/or officer of the court, pro tempore, have his fees taxed as court cost herein and, further, to show cause why this Honorable Court should not appoint a special master, expert or officer of the court, pro tempore, appointed to perform an accounting and valuation of the partnership and of its assets, and why the fees of said master, expert or officer of the Court should not be taxed as court cost herein;

(18) And for all general and equitable relief as the law and the nature of the case may afford.

DUPUIS, MAYERS & HARSON

BY: _____
STEVEN J. DUPUIS, ATTORNEY
FOR PETITIONERS

ORDER

Considering the foregoing petition and the facts set forth therein,

IT IS ORDERED BY THIS COURT that defendants show cause on the 20 day of January, 1986, why this Honorable Court should not appoint a special master, liquidator, conservator, and/or commissioner to function as managing partner of the partnership presently and until judgment herein is rendered and that the said special master, expert and/or officer of the court, pro tempore, have his fees taxed as court cost herein and further to show cause why this Honorable Court should not appoint a special master, expert or officer of the court, pro tempore, appointed to perform an accounting and valuation of the partnership and of its assets, and why the fees of said master, expert or officer of the Court should not be taxed as court cost herein.

Lafayette, Louisiana, this 3rd day of January, 1986.

_____
DISTRICT JUDGE

PLEASE SERVE PERSONALLY:

SBS-RUE BIENVILLE 1981 VENTURE
A LOUISIANA PARTNERSHIP IN COMMENDAM
Through its general partner
The Becnel Company
through its president
Thomas R. Becnel
101 La Rue France, Suite 500
Lafayette, Louisiana 70508

THE BECNEL COMPANY
Through its registered agent
Thomas R. Becnel
101 La Rue France, Suite 500
Lafayette, Louisiana 70508

THOMAS R. BECNEL
101 La Rue France, Suite 500
Lafayette, Louisiana 70508

JOHN D. PRICE
1507 Alice Drive
Lafayette, Louisiana 70503

BRIT BUSCH
107 Nickerson Parkway
Lafayette, Louisiana 70501

MANNING F. BILLEAUD
145 Girard Woods Drive
Lafayette, Louisiana 70503

EXHIBIT F

FEDERAL PETITION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
AUG 19 1987
ROBERT H. SHEMWELL, CLERK
BY S/CB
DEPUTY

STEVEN J. DUPUIS, STEVEN J. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, JAMES H. DUPUIS, JAMES H. DUPUIS, JR. IRREVOCABLE INTER VIVOS TRUST, JOHN W. DUPUIS, III, AND JOHN W. DUPUIS, IV IRREVOCABLE INTER VIVOS TRUST,

Plaintiffs

VS.

THOMAS R. BECNEL AND THE BECNEL COMPANY,

Defendants

CV87-1781
CIVIL ACTION

SEC O JUDGE SHAW

SECTION " "

MAGISTRATE DIV.

COMPLAINT

Steven J. Dupuis, Steven J. Dupuis, Jr. Irrevocable Inter Vivos Trust, James H. Dupuis, James H. Dupuis, Jr. Irrevocable Inter Vivos Trust, John W. Dupuis, III, and John W. Dupuis, IV Irrevocable Inter Vivos Trust complain and allege as follows:

JURISDICTION

1. These proceedings arise under, and jurisdiction is founded upon, the laws of the United States of America, more particularly the following:
   (a) The Act of Congress of May 27, 1933, known as the "Securities Act of 1933," § 22(a) of which grants to the United States District Courts exclusive jurisdiction over actions arising under said Act, codified at 15 U.S.C. § 77v;
   (b) The Act of Congress of June 6, 1934, known as the "Securities Exchange Act of 1934," § 27 of which grants to the United States District Courts exclusive jurisdiction over actions arising under said Act, codified at 15 U.S.C. § 78aa;
   (c) The Rules and Regulations of the United States Securities and Exchange Commission, as promulgated according to authority granted said Commission by the Securities Act of 1933 and the Securities Exchange Act of 1934, including without limitation the regulation appearing at 17 C.F.R. § 240.10b-5, more commonly known as "Rule 10b-5;"
   (d) The Rackateer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964 (c); and

(e) As to the state-law claims asserted herein, pendent jurisdiction arising from the court's jurisdiction over the federal claims herein.

Venue

2. Venue is proper in this district as each defendant is found in, is an inhabitant of, or transacts business in this judicial district, and because acts or transactions constituting the violations alleged herein occurred in this judicial district.

Plaintiffs

3. Plaintiffs herein are as follows:

(a) Steven J. Dupuis, a person of full age of majority domiciled in the Parish of Lafayette, State of Louisiana;

(b) Steven J. Dupuis, Jr. Irrevocable Inter Vivos Trust, a trust created and existing pursuant to Louisiana law;

(c) James H. Dupuis, a person of full age of majority domiciled in the Parish of Lafayette, State of Louisiana;

(d) James H. Dupuis, Jr. Irrevocable Inter Vivos Trust, a trust created and existing pursuant to Louisiana law;

(e) John W. Dupuis, III, a person of full age of majority domiciled in Indian Rocks Beach, State of Florida; and,

(f) John W. Dupuis, IV Irrevocable Inter Vivos Trust, a trust created and existing pursuant to Louisiana law,

all of whom are sometimes referred to herein collectively as "Plaintiffs."

Defendants

4. Made defendants herein are:

(a) Thomas R. Becnel, a person of the full age of majority domiciled in the Parish of Lafayette , State of Louisiana; and,

(b) The Becnel Company, a Louisiana corporation with its principal place of business in the Parish of Lafayette, State of Louisiana, which is wholly owned and operated by Thomas R. Becnel, who also serves as its President and Director,

who are sometimes referred to herein collectively as "Defendants."

General Allegations

5. In 1980, Plaintiffs owned approximately 3.6 acres of undeveloped property in Lafayette, Louisiana, located at the intersection of Rue Beauregard Extension and Rue Bienville roads. The Plaintiffs' property was valued at that time at approximately $1,200,000.00. Thomas R. Becnel ("Becnel") approached the Plaintiffs with a plan to develop their

property and solicited their participation in his plan.

6. Becnel represented to the Plaintiffs that the site could be developed and used for the construction of a large commercial office building. Becnel stated that he possessed the requisite "know-how" and experience to arrange the development transactions, construct the office building with funds obtained from a lender, arrange leases for use of the office space and manage the building after completion.

7. Under Becnel's plan, Plaintiffs would contribute their land to the venture, which Becnel would then mortgage to obtain funds for the construction of the building. Becnel and his wholly-owned corporation, the Becnel Company, would undertake all tasks necessary to construct and lease-out the building, and then manage the building after it opened. Becnel proposed that he and the Becnel Company would own 67% of the investment venture in return for their services and that Plaintiffs collectively would own a 33% interest in the investment in return for their contribution of the property.

8. Becnel provided Plaintiffs with several written projections of the profits they could expect to receive from their investment. According to Becnel's representations, the Plaintiffs could expect to share in $180,000 to $294,000 in net income per year that would be generated by the project. At the time he was promoting this investment and soliciting Plaintiffs' participation in his plan, Becnel consistently assured Plaintiffs that the development would generate income well in excess of expenses and that they would share in that income according to their interest in the project.

9. Because the Plaintiffs were contributing property to the venture valued at approximately $1,200,000, Becnel further assured the Plaintiffs that, if any investment property was sold, any proceeds of the sale would be distributed on a priority basis to the plaintiffs at the rate of $7.50 per square foot to compensate Plaintiffs for their contribution, before any distribution to any other partner.

10. Plaintiffs placed a great amount of trust and confidence in Becnel and at that time had no reason to doubt the truthfulness of any of the representations made by Becnel or by the Becnel Company through Becnel.

11. In reliance upon the assurances and representations of the Defendants, Plaintiffs agreed to participate in the investment plans proposed by the Defendants.

12. Becnel organized "SBS - Rue Bienville 1981 Venture, A Louisiana Partnership in Commendam" (the "Partnership") as the legal vehicle through which the investment scheme would take place. Plaintiffs would contribute their land in return for limited partnership interests in the Partnership. Becnel and the Becnel Company would contribute their know-how, experience and management services to the project. In return, the Becnel Company, at that time doing business as the SBS Building Corporation, would become then general partner of the Partnership, and Becnel would become a limited partner in the venture.

13. Plaintiffs and Defendants executed the Articles of Partnership of the Partnership on June 22, 1981. Plaintiffs transferred their land to the Partnership as called for by the partnership agreement. Though Becnel and the Becnel Company were to contribute respectively $100.00 and $500.00 cash to the Partnership, on information and belief, neither Defendant paid its cash capital contribution to the Partnership.

14. After Plaintiffs transferred the land to the Partnership, Defendants obtained financing to construct the proposed office building by mortgaging the land. Defendants thereafter built and began to lease the office building.

15. Plaintiffs later learned that the Defendants admitted new limited partners to the investment without their consent. Based upon the representations of Defendants, including the assurance that the Partnership would generate income well in excess of expenses and permit the distribution of net income to the limited partners, Plaintiffs thereafter consented to the admission of these new limited partners to the Partnership.

16. Despite the representations made by the Defendants, Plaintiffs never received any income from the leasing operations of the building, except for small sums distributed from February 1986 through January 1987. Plaintiffs learned only recently that Defendants improperly diverted income from the Partnership to themselves in the form of unauthorized management fees, commitment fees and leasing fees. By wrongfully diverting income from the Partnership to themselves, Defendants have exploited the assets of the Partnership and rendered it unable to distribute the income Plaintiffs were entitled to receive.

17. After Plaintiffs confronted Defendants with the wrongful diversion of income from the Partnership, Becnel informed Plaintiffs that the primary tenant in the project, Trans LA Corp., would be vacating the building. Plaintiffs have since learned that Becnel secretly negotiated for the relocation of Trans LA Corp. from the Partnership's building to a building that Defendants would construct for Trans LA Corp. and that would be wholly owned by Becnel of the ARAS Corporation, a corporation owned, operated and/or controlled by Becnel. As a result of Becnel's actions in relocating Trans LA Corp., the Partnership will incur great losses in income and will be unable to meet expenses including debt service. In addition, the loss of this tenant will greatly reduce the value of Plaintiffs' investment in this project.

18. After devaluing the project by his improper acts, Becnel and others presented to Plaintiffs a potential purchaser of their investments. As a condition of further negotiations, Becnel, with the assistance of Manning Billeaud and/or The Billeaud Company, demanded that Plaintiffs waive their rights under the Partnership agreement to preferential distribution of proceeds from the sale of Partnership assets. When Plaintiffs refused to relinquish these rights, Becnel wrongfully terminated negotiations with the potential purchaser.

19. By reason of Defendants' recent actions, Plaintiffs have learned that many of the representations made to them in connection with the purchases of their investments where false and misleading in many

particulars. Furthermore, Defendants ommited material facts necessary to make their statements and representations not misleading in the light of the circumstances in which they were made. These misrepresentations and omissions include, but are not limited to, the following:

(a) Plaintiffs were led to believe that they would receive a reasonable return on their investment in these limited partnership interests, but in fact have not received such a return on their investments;

(b) Plaintiffs were informed that the project would produce $180,000 to $294,000 in spendable net income per year, when in fact, because of Defendants' scheme to divert income from the Partnership, the project would not produce income for distribution to the limited partners as projected;

(c) Defendants agreed to make cash capital contributions to the Partnership and to make periodic financial reports on its affairs, when they did not intend to and have not done so as promised;

(d) Plaintiffs were led to believe that Defendants would contribute their know-how and experience to the Partnership as a capital contribution in return for a 67% interest in the Partnership, when instead Defendants planned to and did unilaterally withdraw cash from the Partnership to pay themselves unauthorized management fees, commitment fees and leasing fees;

(e) Defendants failed to disclose their intent to enter into management contracts and other contracts with the Partnership that were designed to benefit the Defendants and misled Plaintiffs to believe that any services they provided the Partnership would be a part of their capital contribution;

(f) Plaintiffs were not informed that many items on the "pro formas" and other written projections given to them by the Defendants were false and misleading in material respects, or that these "pro formas" failed to disclose material facts;

(g) Defendants led Plaintiffs to believe that they had the skill, know-how and ability to operate and would operate the Partnership property profitably, when they either could not or would not do so;

(h) Plaintiffs were led to believe that the Defendants would Act as their agents and fiduciaries with respect to Partnership income and property, when Defendants did not intend to do so, instead diverting at least one tenant and one potential purchaser of the Partnership property for their own benefit;

(i) Plaintiffs were led to believe that Defendants would not undertake actions that would lower the value of their investments in the Partnership, when in fact Defendants would and did take such action whenever it suited their interests;

(j) Defendants never informed Plaintiffs of certain transactions involving the Partnership that were designed to unfairly benefit Defendants or persons associated with the Defendants;

(k) Plaintiffs were led to believe that Defendants would accurately account for the use of partnership funds, when on information and belief, they have not done so; and,

(l) Plaintiffs were led to believe that their investments, made on the basis of Defendants' representations, were in their best interests, when in truth and in fact, they were not.

20. Defendants know or should have known the truth regarding the matters in paragraph 19, but intentionally or by severe recklessness made untrue statements of material fact and ommited to state material facts necessary in order to make their statements, in the light of the circumstances in which they were made, not misleading, in the respects, among others, set forth above.

21. Plaintiffs relied on the misrepresentations of Defendants in investing in the Partnership. Indeed, if Plaintiffs had been informed of the material facts that were omitted or misrepresented, they would not have purchased or made their investments.

22. In connection with the offer and/or sale of the various investments in limited partnership interests, Defendants employed and made use of means of instrumentalities of interstate commerce and/or of the United States mail.

23. Plaintiffs did not know, and in the exercise of reasonable diligence could not have known, of the Defendants' misstatements or omissions, or of the other material facts giving rise to this action prior to the expiration of any applicable limitations period. Despite requests by Plaintiffs for information about and financial statements of Partnership affairs, which they were entitled to receive under the Partnership agreement, Defendants either refused to provide the requested information or misled Plaintiffs as to material facts and/or the true status of Partnership affairs, including the facts giving rise to this action.

24. Defendants are jointly and severally liable to Plaintiffs for all of their acts and omissions as each aided and abetted the other in the wrongful conduct alleged herein.

25. Becnel also controlled the Becnel Company, and therefore is liable as a controlling person of the Becnel Company. Additionally, Becnel acted as the alter ego of the Becnel Company and is liable as such for the acts and omissions of the Becnel Company.

26. Defendants acted as promoters, sellers and substantial participants in the sales of the investments to Plaintiffs in the respects, among other, set forth in the preceding General Allegations, knowing that their actions were part of an overall improper scheme and the injuries to Plaintiffs flowed directly and proximately from each of their actions. Without the participation and assistance of each defendant in causing Plaintiffs to purchase their investments based on their false or misleading statements and/or material omissions, the transactions would not have taken place.

27. Plaintiffs hereby tender their investments to Defendants, contingent upon the granting of the relief praved for by Plaintiffs in this Complaint.

COUNT I
(Section 10b and Rule 10b-5)

28. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

29. The investments made by Plaintiffs in the Partnership constitute "securities" as that term is defined in the Securities Exchange Act of 1934.

30. Defendants, as advisors, promoters, sellers, and fiduciaries, owed a duty to Plaintiffs to disclose all material facts that a reasonable investor would consider important, including the disclosure of omitted material facts and the disclosure of material facts necessary to make statements, in light of the circumstances in which they were made, not misleading.

31. In connection with sales to and purchases by Plaintiffs of the securities described in this Complaint, Defendants, intentionally or by severe recklessness, directly or indirectly, employed a scheme or artifice to defraud Plaintiffs by making untrue statements of material fact or omitting to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading, and by engaging in acts, practices, and/or a course of business and conduct which acted as a fraud or deceit, in the respects, among others, set forth in the General Allegations and also in paragraph 23, all in violation of the provisions of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.

32. Accordingly, Plaintiffs are entitled to judgment against Defendants rescinding their investments and ordering return of the consideration given therefore, and for damages sufficient to compensate them for the losses they incurred in connection with the investments, plus interest. Plaintiffs are further entitled to an accounting from Defendants.

COUNT II
(Sections 12 (2))

33. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

34. The investments entered into by Plaintiffs constitute "securities" as that term is defined in the Securities Act of 1933.

35. In connection with the offers and sales to and purchases by Plaintiffs of the investments described in this Complaint, Defendants made untrue statements of material fact and omitted to state material facts necessary in order to make the statements, in light of the circumstances in which they were made, not misleading, in the respects, among others, set forth in the General Allegations and also in paragraph 23, all in violation of Section 12(2) of the Securities Act of 1933.

36. Accordingly, Plaintiffs are entitled to judgment against Defendants rescinding their investments and ordering return of the value of the consideration paid therefor, plus legal interest, or alternatively, for damages.

COUNT III
(RICO)

37. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

38. Defendants unlawfully received income derived from a pattern of unlawful activity, as described in 18 U.S.C. § 1961 (5), in which those Defendants participated as principals, and used or invested all or part of such income, or the proceeds of such income, to acquire an interest in or to establish or operate an enterprize engaged in or affecting interstate or foreign commerce, as described in 18 U.S.C. § 1961 (4), in violation of 18 U.S.C. § 1962 (a), in the respects, among others, set forth in the General Allegations of this Complaint. The income derived by Defendants from a pattern of unlawful activity, as described in 18 U.S.C. § 1961 (5), includes the property contributed to the Partnership by Plaintiffs, the loan proceeds obtained by mortgaging Partnership property, the management, commitment and leasing fees obtained by Defendants and income received by Defendants from other interests by reason of the wrongful diversion of at least one tennant and/or purchaser from Partnership property.

39. Defendants unlawfully, through a pattern of unlawful activity, as described in 18 U.S.C. § 1961 (5), acquired or maintained an interest in or control of an enterprise engaged in or affecting interstate commerce, as described in 18 U.S.C. § 1961 (4), in violation of 18 U.S.C. § 1962 (b), in the respects, among others, set forth in the General Allegations of this Complaint.

40. Defendants, who were employed by or associated with an enterprise engaged in or the activities of which affect interstate commerce, as described in 18 U.S.C. § 1961 (4), conducted or participated in the conduct of the affairs of such enterprise through a pattern of unlawful activity, as described in 18 U.S.C. § 1961 (5), in violation of 18 U.S.C. § 1962 (c), in the respects, among others, set forth in the General Allegations of this Complaint.

41. Defendants conspired with each other and with others whose identities are not presently known to Plaintiffs to violate 18 U.S.C. § 1962 (a), § 1962 (b) and § 1962 (c), in violation of 18 U.S.C. § 1962 (d), in the respects, among others, set forth in the General Allegations of this Complaint.

42. The specific activities constituting the pattern of unlawful activity, as required by 18 U.S.C. § 1961 (5), 1962 (a), 1962 (b), 1962 (c) and 1962 (d), are set forth in the General Allegations and Counts I and II of this Complaint, and include (a) acts of fraud in the sale of securities punishable under 15 U.S.C. §§ 77K and 77n, 15 U.S.C. § 77j (b), and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5), (b) acts of mail fraud indictable under 18 U.S.C. § 1341 and (c) acts of wire fraud indictable under 18 U.S.C. § 1343. Specifically:

(a) Defendants violated the federal securities laws in the respects, among others, set forth in the General Allegations and Counts I and II of this Complaint;

(b) Defendants, having devised a scheme or artifice to defraud or to obtain money and property by means of false representations, as set forth in the preceding allegations of this Complaint, knowingly placed or caused to be placed in the post office or authorized depository for mail, matters and things to be sent or delivered by the Postal Service including without limitation *pro formas* containing false and misleading information, Partnership documents and other items related to the formation, business and status of the Partnership, all in support and furtherance of Defendants' scheme; and,

(c) Defendants, having devised a scheme or artifice to defraud or to obtain money and property by means of false representations, as set forth in the preceding allegations of this Complaint, transmitted or caused to be transmitted signals over interstate wires, including without limitation interstate transmissions to Steven Dupuis and John Dupuis, III, all in support and furtherance of Defendants' scheme.

The activities constituting the pattern of unlawful activity occurred after the effective date of 18 U.S.C. § 1961 **et seq.** and within ten years of each other.

43. The enterprise required by 18 U.S.C. § 1961 (4) and 1962 consists, alternatively, of (a) the Partnership, (b) the Becnel Co., formerly SBS Building Corporation or (c) an association in fact among Becnel, the Becnel Company and the Partnership.

44. Plaintiffs have been injured in their business and property by reason of Defendants' violations of 18 U.S.C. § 1962, in that Plaintiffs have incurred damages presently estimated at $2,500,000.

45. Accordingly, under 18 U.S.C. § 1964 (c), Plaintiffs are entitled to judgment against Defendants **in solido** for treble the damages sustained by Plaintiffs as a result of Defendants' violations of 18 U.S.C. § 1962, or $7,500,000, together with interest, costs and attorney's fees.

COUNT IV
(Louisiana Blue Sky Law)

46. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

47. Plaintiffs' investments in the Partnership constituted "securities" as that term is defined in the Louisiana Blue Sky Law; La. R.S. 51:702(15).

48. Defendants offered to sell and sold these investments by means of oral and/or written untrue statements of material fact and/or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in the respects, among others, set forth in the General Allegations and also in Paragraph 23, all in violation of La. R.S. 51:712 (A)(2).

49. Accordingly, Defendants are liable to Plaintiffs pursuant to La. R.S. 51:714 for return of the consideration paid for the security, plus interest, costs and attorney's fees or, alternatively, for damages.

COUNT V
(Tortious Conduct)

50. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

51. Defendants' conduct constitutes conversion, diversion, wrongful misrepresentation, failure to disclose information, negligence and other wrongful conduct under applicable Louisiana law, including without limitation Article 2315 of the Louisiana Civil Code, in the respects, among others, set forth in the General Allegations and also in Paragraph 23.

52. Defendants' conduct caused damages to Plaintiffs by reducing the value of their investment and depriving them of profits from the Partnership, among other things. Accordingly, Plaintiffs are entitled to recover damages from Defendants for their tortious acts and omissions.

COUNT VI
(Fraud)

53. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

54. The conduct of the Defendants as set forth hereinabove, and more particularly those acts alleged in the General Allegations and also in paragraph 23, constituted a scheme to defraud Plaintiffs in violation of the laws of the State of Louisiana, including without limitation, article 1953 **et seq.** of the Louisiana Civil Code, which violation is a continuing violation and/or was not discovered more than one year prior to the filing of this Complaint.

55. Defendants' conduct caused damages to Plaintiffs by reducing the value of their investment and depriving them of profits from the Partnership, among other things. Accordingly, the Plaintiffs are entitled to recover damages from the Defendants for their fraudulent conduct.

COUNT VII
(Breach of Duty)

56. Plaintiffs hereby adopt, incorporate and reiterate all preceding allegations of this Complaint.

57. At all relevent times hereto, Defendants occupied positions of trust and confidence with regard to the Plaintiffs, and owed to Plaintiffs fiduciary and other duties and obligations under applicable law.

58. Defendants' conduct alleged in this Complaint constitutes a breach of their fiduciary and other duties and obligations owed to Plaintiffs under applicable law.

59. Defendants' conduct caused damages to Plaintiffs by reducing the value of their investment and depriving them of profits from the Partnership, among other things. Accordingly, Plaintiffs are entitled to recover damages from Defendants for their breaches of their fiduciary duties.

COUNT VIII
(Demand for Trial by Jury)

60. Plaintiffs are entitled to, and hereby demand, trial by jury of all issues in this proceeding.

WHEREFORE, Plaintiffs pray for judgment in their favor and against Defendants as demanded under Counts I through VIII hereinabove, and for such other and further relief as justice of the nature of the case may require.

Phillip A. Wittman
Sarah S. Vance
Richard C. Stanley
Of
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Attorneys for the Plaintiffs

EXHIBIT G

CLERK'S COST SHEET

SUIT NUMBER 858457
DECEMBER 3, 1987

PLAINTIFF: STEVEN J. DUPUIS SR ET AL
DEFENDANT: BECNEL CO, ET AL
CAUSE: BREACH/DAMAGES
PLAINTIFF'S ATTORNEY: ANTHONY FAZZIO
STREET: BOX #98
CITY:

DIVISION: J

DEFENDANT'S ATTORNEY

TOTAL	PLAINTIFF	DEPOSITS DEFENDANT	OTHER
7,138.00	4,786.00	1,090.00	1,262.00

TOTAL	CLERK	COST SHERIFF	WITNESS FEE	OTHER
5,463.75	4,333.25	884.50	0.00	246.00

ADVANCE	BALANCES WITNESS	BOND
1,674.25	0.00	0.00

REF.	DATE		DESCRIPTION		TYPE	DEPOSITS	CHARGES	CHECK-NUMBER
1	851231	97	ADVANCE DEPOSIT	DM& H 4030	D	225.00		
2	851231	13	LAW LIBRARY		C		1.00	59941
3	851231	29	JUDICIAL EXP ACCT		C		15.00	59943
4	851231	40	JUDGE'S COMP FUND		C		10.00	59944
5	851231	12	PET REQ FOR PROD INTERROGS 2CIT RULE 1 20 JD		C		134.00	59940
6	860108	21	SHF FEE LAF	775-10	C		114.50	60473
7	860109	21	SHF FEE LAF	777-2	C		14.50	60482
8	860109	97	ADVANCE DEPOSIT	DM&H 4056	D	25.00		
9	860109	00	SUB DT, S. DUPUIS		C		9.00	60471
10	860114	21	SHF FEE LAF	783	C		10.50	60482
11	860114	97	ADVANCE DEPOSIT	DM&H 4064	D	25.00		
12	860114	00	SUB, S. DUPUIS		C		9.00	60471
13	860114	97	ADVANCE DEPOSIT	DM&H 4065	D	25.00		
14	860114	00	SUB, S. DUPUIS		C		9.00	60480
15	860115	97	ADVANCE DEPOSIT	DM&H 4086	D	100.00		
16	860115	00	FIRST AMEND PET 5 CITS VERT, S. DUPUIS		C		61.00	60480
17	860115	00	MEMO, S. DUPUIS		C		5.00	60480
18	860115	97	ADVANCE DEPOSIT	DM&H 4078	D	25.00		

19	860115	00	SUB DT, S. DUPUIS	C		9.00	60480
20	860116	21	SHF FEE LAF 785-2	C		20.00	60563
21	860116	97	ADVANCE DEPOSIT THOMAS CURTIS 1166	D	100.00		
22	860116	00	EXCEPTION ANS REC DMD MEMO CIT VERT T. CURTIS	C		56.00	60561
23	860116	40	JUDGE'S COMP FUND REC DMD	C		10.00	60574
24	860116	00	3 SUBS 3 SUB DT, T. CURTIS	C		54.00	60898
25	860117	21	SHF FEE LAF 787	C		10.50	60900
26	860121	21	SHF FEE LAF 790-6	C		65.50	61424
27	860122	21	SHF FEE LAF 793	C		15.50	61424
28	860123	21	SHF FEE LAF 794-5	C		73.50	61564
29	860127	00	INTERROGS, T. CURTIS	C		22.00	60898
30	860127	97	ADVANCE DEPOSIT DM&H 4092	D	100.00		
31	860205	00	EXCEPTION, S. DUPUIS	C		8.00	61422
32	860212	97	ADVANCE DEPOSIT DM&H 4126	D	100.00		
33	860214	00	LETTER S. DUPUIS	C		5.00	61562
34	860214	97	ADVANCE DEPOSIT DM&H 4131	D	100.00		
35	860214	00	LETTER TO SET RULES ON MERITS, S. DUPUIS	C		8.00	61562
36	860214	97	ADVANCE DEPOSIT DM&H 4129	D	25.00		
37	860214	00	NTC OF DEP SUB SUB DT, S. DUPUIS	C		23.00	61562
38	860214	97	ADVANCE DEPOSIT DM&H 4137	D	25.00		
39	860214	00	SUB SUB DT NTC OF DEP S. DUPUIS	C		23.00	61562
40	860214	00	REQ. FOR PROD CIT. S. DUPUIS	C		23.00	61562
41	860214	00	M&O TO FIX FOR TRIAL, S. DUPUIS	C		7.00	61562
42	860214	00	NTC OF DEP SUB S. DUPUIS	C		14.00	61562
43	860214	00	NTC OF DEP SUB S. DUPUIS	C		14.00	61562
44	860214	00	NTC OF DEP SUB S. DUPUIS	C		14.00	61562
45	860214	00	NTC OF DEP SUB, S. DUPUIS	C		14.00	61562
46	860214	00	NTC OF DEP SUB, S. DUPUIS	C		14.00	61562
47	860214	97	ADVANCE DEPOSIT DM&H 4134, 4133, 4132, 4136	D	100.00		
48	860214	97	ADVANCE DEPOSIT DM&H 4135, 4130	D	125.00		
49	860218	00	ANS TO INTERROGS, RESP TO REQ FOR PROD, CURTIS	C		16.00	61574
50	860219	00	RESP TO REQ FOR PROD S. DUPUIS	C		14.00	61603
51	860219	00	ANS TO INTERROGS MEMO S. DUPUIS	C		52.00	61603
52	860219	00	M&O FOR EXT OF TIME M&O TO CONT T. CURTIS FILED	C			61603
53	860219	00	AWAY	C		20.00	61603
54	860219	00	EXCEPTION SET ON 4-16 OR 7-30 MOT TO QUASH MOT	C			61603
55	860219	00	COMPEL T. CURTIS	C		58.00	61603

56	860220	97	ADVANCE DEPOSIT DM&H 4155	D	100.00				
57	860220	21	SHF FEE LAF 835-2	C		15.50			61696
58	860221	21	SHF FEE LAF 837-3	C		29.50			61766
59	860224	12	ALL RULES ARE SET 7-30 NTC CC	C					61907
60	860224	97	ADVANCE DEPOSIT THOMAS D. CURTIS 1435	D	265.00				
61	860224	00	REQ FOR PROD T. CURTIS	C		13.00			61807
62	860224	12	M&O TO QUASH 3-24 NTC CC, T. CURTIS	C		29.00			61807
63	860224	12	CHANGE RULE DATE ON M&O TO QUASH TO 3-10	C		61087			
64	860224	12	M&O TO COMPEL 4-7 NTC CC T. CURTIS	C		35.00			61807
65	860225	21	SHF FEE LAF 841-3	C		26.00			61852
66	860226	00	M&O FOR PD, LETTER TO FIX FOR TRIAL S. DUPUIS	C		17.00			61898
67	860226	12	LETTER TO SET MOT TO QUASH 3-10 NTC CC S. DUPUIS	C		11.00			61898
68	860226	97	ADVANCE DEPOSIT DM&H 4162	D	100.00				
69	860226	12	RULE ORDER 3-10 NTC CC S. DUPUIS	C		29.00			61898
70	860227	21	SHF FEE LAF 846	C		20.50			61951
71	860228	00	COPY OF PRETRIAL MOTION FROM DUPUIS	C		5.00			61989
72	860228	21	SHF FEE LAF 849	C		9.50			61991
73	860303	12	M&O TO CONT & RESET RULE 3 24, CURTIS, TO J	C		12.00			62035
74	860303	97	ADVANCE DEPOSIT DM&H 4179	D	100.00				
75	2/26/86	23	PD ENTERED	C		2.00			62053
76	860303	00	LETTER, S. DUPUIS	C		5.00			62033
77	860303	00	LETTER FROM CLERK	C		5.00			62033
78	860304	21	SHF FEE LAF 853	C		25.50			62076
79	860305	00	LETTER, S. DUPUIS	C		5.00			62092
80	860305	21	SHF FEE LAF 856-2	C		50.00			62094
81	860305	00	MEMO S. DUPUIS	C		5.00			62092
82	860310	00	MEMO S. DUPUIS	C		5.00			62249
83	860310	97	ADVANCE DEPOSIT DM&H 4189	D	100.00				
84	860310	12	M&O FOR RULE 4-7 NTC CC. S. DUPUIS	C		31.00			62249
85	3/10/86	00	BEING SUBMIT ON BRIEFS	C		2.00			62269
86	860313	00	LETTER, DUPUIS	C		5.00			62446
87	860313	00	PRETRIAL ORDER, DUPUIS, COPY	C		5.00			62446
88	860314	00	MEMO, T. CURTIS	C		5.00			62511
89	860314	00	OPPOS TO MOT TO COMPEL, CURTIS	C		5.00			62511
90	860314	00	SUPP MEMO, S. DUPUIS	C		5.00			62511
91	860317	00	REASONS FOR JMT	C		5.00			62554
92	860318	00	SUPP MEMO, EXCEPTION, THOMAS CURTIS	C		20.00			62580

93	860319	21	SHF FEE LAF 902	C		24.50	62632
94	860320	00	REASONS FOR JMT	C		5.00	62664
95	860320	97	ADVANCE DEPOSIT DM&H 4211	D	100.00		
96	860320	00	SECOND AMEND PET ORDER CIT, S. DUPUIS	C		33.00	62664
97	860331	00	REASONS FOR JMT	C		5.00	62935
98	860401	21	SHF FEE LAF 879	C		14.50	62952
99	860404	00	EXCEPTION, MEMO, MOT TO STRIKE, TOM CURTIS	C		29.00	63237
100	860407	00	EXCEPTION, STEVEN DUPUIS	C		8.00	63268
101	860407	00	JMT ON RULE, 2CC, PL COSTS	C		16.00	63268
102	860407	00	MEMO, S. DUPUIS	C		5.00	63268
103	860407	00	MEMO, S. DUPUIS	C		5.00	63268
104	860407	00	MEMO, S. DUPUIS	C		5.00	63268
105	860407	00	MEMO, S. DUPUIS	C		5.00	63268
106	860407	00	MEMO, S. DUPUIS	C		5.00	63268
107	860407	00	MEMO, S. DUPUIS	C		5.00	63268
108	860407	00	MEMO, S. DUPUIS	C		5.00	63268
109	860407	00	MEMO, S. DUPUIS	C		5.00	63268
110	4/7/86	00	SUBMIT ON BRIEFS	C		2.00	63306
111	860409	97	ADVANCE DEPOSIT DM&H 4242	D	50.00		
112	860409	00	M&O TO BE COCOUSN FOR PL, A FAZZIO	C		12.00	63323
113	860414	00	PRETRIAL ORDER, CURTIS	C		11.00	63473
114	860423	12	LETTER SETTING MATTERS 5 19, DUPUIS	C		11.00	63922
115	860424	00	2JMTS ON RULE, 4CC	C		29.00	63967
116	860425	00	REASONS FOR JMT	C		5.00	64022
117	860502	00	SUPP ANS TO INTERROGS, S. DUPUIS	C		20.00	64217
118	860512	00	NTC OF DEPOS, SUB SUB DT, T. CURTIS	C		31.00	64487
119	860512	00	MEMO, S. DUPUIS	C		5.00	64487
120	860515	21	SHF FEE LAF 969-2	C		21.00	64637
121	860515	97	ADVANCE DEPOSIT DM&H 4344	D	100.00		
122	860515	12	M&O FOR PROTECTIVE ORDER 5-19 NTC CC S. DUPUIS	C		29.00	64635
123	860516	97	ADVANCE DEPOSIT DM&H 4345	D	100.00		
124	860516	00	OBJ & SUPP ANS TO INTERROGS, DUPUIS	C		50.00	64667
125	860516	00	MEMO, CURTIS	C		5.00	64667
126	860516	19	NTC OF TRIAL NOV 12 86 2CC	C		12.00	64667
127	860519	00	JMT, 2CC DEF COSTS	C		13.00	64713
128	860520	00	MOT FOR NEW TRIAL, MEMO, NO ORDER, T CURTIS	C		13.00	64756
129	860520	21	SHF FEE LAF 977	C		14.50	64758

130	05/19/86	27	TAKEN UNDER ADV	C		2.00	64756
131	05/19/86	37	JM RULE TO BE SIGNED	C		2.00	64756
132	860522	12	LETTER SETTING NEW TRIAL 7 7 DUPUIS	C		11.00	64878
133	860522	00	SUPP RESP TO REQ FOR PROD ATTS, S. DUPUIS	C		15.00	64878
134	860527	00	OBJ & RES OF RIGHTS, REQ FOR PROD, T CURTIS	C		16.00	64969
135	860530	00	RESP TO REQ FOR PROD ATTS, S. DUPUIS	C		20.00	65130
136	860530	00	RESP TO OBJECTION ATTS, S. DUPUIS	C		21.00	65130
137	860606	00	REASONS FOR JMT	C		5.00	65431
138	860610	00	LETTER CANC RULE, CURTIS	C		5.00	65563
139	860627	97	ADVANCE DEPOSIT SBS RUE BIENVILLE 1013	D	100.00		
140	860627	00	JMT, 2CC	C		13.00	66172
141	860627	12	M&O RULE NTC CC 7 28 ATTS, T CURTIS	C		51.00	66172
142	860630	97	ADVANCE DEPOSIT SBS RUE BIENVILLE 1014	D	100.00		
143	860630	97	ADVANCE DEPOSIT TRANS SBS DEP TO 844238	D	100.00—		
144	860630	97	ADVANCE DEPOSIT BECNEL CO. 3799	D	100.00		
145	860630	12	M&O TO CONS, RULE 7 28 CURTIS	C		36.00	66227
146	860709	21	SHF FEE LAF 42	C		34.50	66600
147	860723	21	SHF FEE LAF 2·62	C		34.5	67100
148	860724	00	MOT TO CONT, CERT, CURTIS, NO RULE	C		10.00	67157
149	860724	00	OPPOS TO NEW TRIAL, CURTIS	C		10.00	67157
150	860724	00	RULE FOR PROTECTIVE ORDER, 7 28 FAZZIO	C		47.00	67157
151	860724	00	AFF, T. CURTISN	C		10.00	67203
152	860725	00	EXHIBITS, T. CURTISN	C		10.00	67203
153	07/28/86	00	CONT. W/O DATE	C		2.00	67449
154	860806	00	M&O TO EXTEND DEADLINES, CURTIS	C		17.00	67877
155	860811	00	MEMO, CURTIS	C		5.00	67877
156	07/30/86	00	CONT'D W/O DATE	C		2.00	67877
157	860813	97	ADVANCE DEPOSIT DM&H 1232	D	100.00		
158	860815	00	M&O FOR LIMITED FILING TIME, CC, FAZZIO	C		18.00	67974
159	860818	00	MEMO ATTS, A. FAZZIO	C		10.00	68014
160	860819	00	DEP OF S. DUPUIS SR.	C		5.00	68052
161	860822	00	M&O TO DESIGNATE COUNS FOR PL, A FAZZIO	C		17.00	68199
162	860827	00	M&O DISMISSING EXCEPTION, S. DUPUIS	C		12.00	68318
163	860827	97	ADVANCE DEPOSIT DUPUIS 1234	D	100.00		
164	860827	00	ANS TO RECON DMD, DUPUIS	C		8.00	68318
165	860902	97	ADVANCE DEPOSIT THOMAS CURTIS 1788	D	100.00		
166	860902	12	M&O FOR RULE 11·10 NTC CC T. CURTIS	C		29.00	68608

167	860904	00	M&O TO EXTEND DEADLINES, 2CC, T CURTIS	C		27.00		68672
168	860909	00	REASONS FOR JMT	C		5.00		68781
169	860910	00	MEMO, A. FAZZIO	C		5.00		68832
170	860910	12	M&O RULE NTC CC 12 8 ATT, A FAZZIO	C		31.00		68832
171	860911	00	SUPP MEMO A. FAZZIO	C		5.00		68888
172	860912	00	OPPOS TO REQ FOR RECONSIDERATION, CURTIS	C		10.00		68955
173	860915	21	SHF FEE LAF 132	C		29.50		69005
174	861006	00	M&O TO CONT MERTIS, CURTIS, TO J	C		26.00		69729
175	861015	97	ADVANCE DEPOSIT FAZZIO 1471	D	50.00			
176	861015	00	SUB DT BY FAZZIO	C		9.00		70173
177	861016	00	NTC OF DEPO, ANTHONY FAZZIO	C		5.00		70194
178	861017	00	AMEND ANSWER, THOMAS CURTIS	C		13.00		70244
179	861017	00	EXCEPTION, MEMO, CURTIS	C		10.00		70244
180	861017	00	M&O TO QUASH SUB DT, CURTIS, TO J	C		20.00		70244
181	861017	21	SHF FEE LAF 181	C		9.50		70246
182	861017	97	ADVANCE DEPOSIT ANTHONY FAZZIO 1488	D	50.00			
183	861017	00	2 SUB DTS, A. FAZZIO	C		18.00		70244
184	861020	97	ADVANCE DEPOSIT THOMAS D. CURTIS 1874	D	200.00			
185	861020	12	M&O FOR EXT OF DEADLINES RULE 1-5-87 NTC CC	C				70307
186	861020	00	T. CURTIS	C		29.00		70307
187	861020	00	ANS STATEMENT WITNESS & EXHIBITS LIST, T. CURTIS	C		38.00		70307
188	861020	12	CHANGE FROM 1 5 87 TO 11 3 86	C				70307
189	861020	00	WITNESS & EXHIBIT LIST CC A. A. FAZZIO	C		14.00		70307
190	861021	00	SET ALL RULES 11 3 WITH JUDGE BROUSSARD	C		11.00		70344
191	861021	00	EX PARTE M&O FOR PROTECTIVE ODER, CIT, EXH.	C				70344
192	861021	00	SENT TO J, A FAZZIO	C		37.00		70344
193	861023	00	FIRST M&O TO QUASH BY CURTIS RETURNED BY	C				70417
194	861023	00	JUDGE AARON THIS DATE, UNSIGNED, FILE AWAY	C		15.00		70417
195	861023	00	EX PARTE M&O FOR PROTECTIVE ORDER, CURTIS, TO	C				70417
196	861023	00	JUDGE AARON	C		20.00		70417
197	861024	00	AMEND WITNESS LIST, CURTIS	C		5.00		70456
198	861027	21	SHF FEE LAF 193	C		19.50		70501
199	861027	00	EX PARTE M&O FOR PROTECTIVE ORDER DENIED BY	C				70499
200	861027	00	AARON T. CURTIS	C		15.00		70499
201	861028	97	ADVANCE DEPOSIT ANTHONY FAZZIO 1509	D	425.00			
202	861028	00	2 SUBS 2 SUB DTS 8 CITS, A. FAZZIO	C		100.00		70547
203	861029		PRE TRIAL MEMO, THOMAS CURTIS	C		5.00		70610

204	861030	00	SUBPOENAS SERVED BY CIVIL PROCESSOR 11	C			70742
205	11/3/86	37	JM RULE TO BE SIGNED	C		2.00	71087
206	11/4/86	00	ORAL MINUTE ENTRY 3CC	C		14.00	71087
207	861107	00	NTC OF DEPOS, CURTIS	C		10.00	71329
208	861107	00	REQ FOR PROD, INTERROGS, CURTIS	C		20.00	71329
209	861107	97	ADVANCE DEPOSIT T CURTIS 1916	D	25.00		
210	861107	00	SUB DT BY CURTIS	C		9.00	71329
211	861113	21	SHF FEE LAF 215	C		9.50	71486
212	861208	97	ADVANCE DEPOSIT DM&H 4715	D	100.00		
213	861208	97	ADVANCE DEPOSIT DM&H 4714	D	50.00		
214	861208	12	LETTER TO RESET RULE TO 1-5 NTC CC, S. DUPUIS	C		11.00	72408
215	861208	00	RULE ORDER 1-5 NTC CC S. DUPUIS	C		32.00	72408
216	861215	00	JMT ON RULES, 2CC, TO J	C		13.00	72721
217	861215	21	SHF FEE LAF 253	C		14.50	72723
218	861216	00	LETTER, THOMAS CURTIS	C		5.00	72756
219	861219	00	CORRECTED NTC OF HEARING, 01 05 87	C			72933
220	861222	00	LETTER, CURTIS	C		5.00	7297?
221	861222	00	MEMO, ATTS, CURTIS	C		15.00	7297?
222	861229	00	MEMO OF RULE, STEVEN DUPUIS	C		5.00	73090
223	861230	00	LETTERS, S. DUPUIS	C		5.00	73130
224	861230	00	LETTER, S. DUPUIS	C		5.00	73130
225	870105	00	ATTS TO MEMO, DUPUIS	C		10.00	73203
226	1/05/87	37	JM RULE TO BE SIGNED	C		2.00	73485
227	870226	00	NTC OF DEPOS, CURTIS	C		10.00	75301
228	870311	00	NTC OF DEPOS, CURTIS	C		10.00	75642
229	870316	97	ADVANCE DEPOSIT THOMAS CURTIS 2074	D	100.00		
230	870316	12	M&O TO COMPEL, RULE 4 6 T CURTIS	C		26.00	75766
231	870320	00	SECOND AMEND ANSWER, T CURTIS	C		10.00	75956
232	870320	00	LETTER, DUPUIS	C		5.00	75956
233	870320	00	CORRECTED NTC OF HEARING 4-2 WITH PATIN	C			75956
234	870323	00	LETTER, JUDGE AARON	C		5.00	76072
235	870324	21	SHF FEE LAF 380	C		19.50	76092
236	870324	00	NTC TRIAL JUNE 15, 1987	C		16.00	76090
237	870326	00	2 SUBS SUB DT, T. CURTIS	C		27.00	76188
238	870331	21	SHF FEE LAF 2-393	C		15.50	76398
239	4/02/87	37	JM RULE TO BE SIGNED	C		2.00	76574
240	870406	21	SHF FEE LAF 2-400	C		14.50	76602

241	870407	00	REQ FOR PROD, CURTIS	C		10.00	76660
242	870408	00	NTC OF DEPOS, CURTIS	C		10.00	76727
243	870508	00	JMT DENYING NEW TRIAL, 2CC	C		13.00	77876
244	870512	00	M&O TO AMEND ANS, AMEND ANS, T. CURTIS	C		26.00	78058
245	870518	00	PRE-TRIAL ORDER FROM JOHN PATIN	C		8.00	78247
246	870522	00	INTERROGATORY, A. FAZZIO	C		5.00	78455
247	870529	00	ANS TO INTEROGS, CURTIS	C		10.00	78702
248	870601	00	M&O FOR APPEAL NTC & ORDER FOR WRIT APPLICATION	C			78716
249	870601	00	4 NTCS 4 CCS, A. FAZZIO	C		68.00	78716
250	870609	00	M&O FOR APPEAL 4 NTCS 4 CCS, T. CURTIS	C		70.00	79051
251	870611	21	SHF FEE LAF 491	C		29.50	79152
252	870615	21	SHF FEE LAF 3-493	C		78.50	79248
253	870615	00	ORDER TO CONT RULE ON 6-15	C		7.00	79246
254	870615	97	ADVANCE DEPOSIT THOMAS D. CURTIS 2237	D	100.00		
255	870615	12	EXCEPTION MEMO ORDER SET 7 13 T CURTIS	C		23.00	79246
256	870615	12	M&O RULE NTC CC 7 13 T CURTIS	C		26.00	79246
257	870626	00	COPIES REQUESTED BY FAZZIO	C		5.00	79690
258	870713	00	WRIT DENIED FROM C OF A	C		5.00	80135
259	870717	00	WRIT DENIED FROM C OF A	C		5.00	80384
260	870720	97	ADVANCE DEPOSIT ANTHONY M. FAZZIO 2448	D	2,161.00		
261	870724	00	M&O FOR TIME TO APPLY FOR WRITS, FAZZIO, TO J	C		12.00	80579
262	870727	00	M&O FOR EXT TO ANS, CC, FAZZIO	C		18.00	80617
263	870726	97	ADVANCE DEPOSIT SBS RUE BIENVILLE 1310	D	262.00		
264	870806	00	LETTER OF RECEIPT FROM SUPREME COURT	C		5.00	80991
265	870902	00	STEVEN DUPUIS SR ET AL VS BECNEL CO ET AL CT AP	C		210.00	81985
266	870909	00	APPEAL COST COPIES 1407.50 VOL 75.0 POST 10.75	C		1,493.25	82128
267	870914	00	C OF A NTC OF FILING TRANSCRIPT	C		5.00	82285
268	871102	00	WRIT GRANTED FROM SUPREME COURT	C		5.00	84013

EXHIBIT H

APPENDIX OF RECORD ON APPEAL

CHRONOLOGICAL INDEX TO 858457

		Page	Vol.
Minutes of Court		1-2	I
1986			
Jan 3	Petition with Attachments & Order	3-118	I
Jan 3	Interrogatories filed on behalf of Plaintiff to the Becnel Company	119-128	I
Jan 3	Request for Production filed on behalf of Plaintiff to the Becnel Company	142-146	I
Jan 3	Interrogatories filed on behalf of Plaintiff to Thomas R. Becnel	129-138	I
Jan 3	Request for Production filed on behalf of Plaintiff to the Thomas R. Becnel	147-151	I
Jan 8	Citation to Petition & Sheriff's Return (5)	154-158	I
Jan 8	Citation to Rule Nisi & Sheriff's Return (5)	159-163	I
Jan 9	Citation to Petition & Sheriff's Return	164	I
Jan 9	Citation to Rule Nisi & Sheriff's Return	165	I
Jan 14	Motion & Order for Extension of Time filed on behalf of Defendants	166-167	I
Jan 14	Motion & Order to Continue filed on behalf of Defendants	168-170	I
Jan 15	Memorandum in Support of Petitioners' Rules to Show Cause filed on behalf of Plaintiffs	171-185	I
Jan 16	Exceptions: Response in the Alternative: and Reconventional Demand filed on behalf of Defendants	186-197	I
Jan 16	Memorandum in Support of Exceptions: Response in the Alternative: and Reconventional Demand filed on behalf of Defendants	205-220	II
Jan 16	(Petition) First Amending Petition Before Answer Served filed on behalf of Plaintiff	221-225	II
Jan 20	Exception filed on behalf of SBS	226-227	II
Jan 20	Motion to Quash filed on behalf of Defendants	228-229	II
Jan 20	Motion to Order to Compel Posting of Bond or Security for Cost filed on behalf of Defendants	230-232	II
Jan 22	Citation to Reconventional & Sheriff's Return	233	II
Jan 23	Citation to Supplemental & Sheriff's Return (5)	234-238	II
Jan 27	Interrogatories Propounded to All Adverse Parties to be Answered in Writing, Categorically, Under Oath and According to Law filed on behalf of Defendants	239-244	II
Jan 27	Request for Production filed on behalf of Defendants	281-293	II
Feb 5	(Exception) Peremptory Exception of no Cause of Action to the Reconventional Demand filed on behalf of Plaintiffs	315-316	II
Feb 13	Answers to Interrogatories Propounded to all Adverse Parties filed on behalf of Plaintiffs with Attachments	245-274	II
Feb 13	(Answer) Response to Request for Production filed on behalf of Plaintiffs	284-287	II
Feb 14	Notice of Deposition filed on behalf of Plaintiff (6)	317-322	II
Feb 14	(Request) Second Request for Production of Documents filed on behalf of Plaintiff to Defendants	323-326	II
Feb 14	Notice of Deposition filed on behalf of Plaintiffs	327	II
Feb 18	Motion and order to fix for trial filed on behalf of plaintiffs	328	II
Feb 18	(Answers) Responses to Inerrogatories filed on behalf of Defendants	139-141	I
Feb 18	(Answers) Responses to Request for Production filed on behalf of Defendants	152-153	I
Feb 24	Motion to Compel filed on behalf of Defendants	329-332	II
Feb 24	Motion to Quash filed on behalf of Defendants	333-334	II

Feb 25	Order to Motion to Quash filed on behalf of Defendants	335	II
Feb 25	Order to Motion to Compel filed on behalf of Defendants	336	II
Feb 26	Rule to Compel Response to Request for Production and for Expenses filed on behalf of Plaintiff	337-339	II
Feb 26	Motion & Order for Preliminary Default filed on behalf of Plaintiff	340-341	II
Feb 27	Cita[illegible] to Rule Nisi & Sheriff's Return	342	II
Mar 4	Cita[illegible]n to Rule Nisi & Sheriff's Return	343	II
Mar 5	Cita[illegible]on to Rule Nisi & Sheriff's Return (2)	344-345	II
Mar 5	Memorandum in Opposition to Motion to Quash filed on behalf of Plaintiffs	346-350	II
Mar 5	Memorandum in Support of Rule to Compel Production of Documents and for Expenses filed on behalf of Plaintiffs	351-363	II
Mar 10	Memorandum of Respondents in Opposition to Motion to Compel filed on behalf of Plaintiffs	364-378	II
Mar 12	Motion & Order to Protect Opponent Against Oppressive Discovery Procedure filed on behalf of Plaintiffs	379-380	II
Mar 12	Memorandum in Support of Motion for Protective Order filed on behalf of Plaintiffs	381-382	II
Mar 13	Letter from Plaintiffs Attorney to Defendants	383	II
Mar 13	Pre Trial Order filed on behalf of Plaintiffs	384-386	II
Mar 14	Opposition to Motion to Compel and for Sanction filed on behalf of Defendants	387-389	II
Mar 14	Memorandum in Support of Motion to Compel filed on behalf of Defendants	390-393	II
Mar 17	Reasons for Judgment	394-396	II
Mar 18	(Memorandum) Supplemental Memorandum in Support of Exceptions filed on behalf of Defendants	397-400	II
Mar 18	Exceptions, Response in the Alternative and Reconventional Demand filed on behalf of Price, Busch & Billeaud	401-403	III
Mar 19	Citation to rule Nisi & Sheriffs return	404	III
Mar 20	Reasons for Judgment	405-407	III
Mar 20	(Petition) Second Amending Petition filed on behalf of Plaintiff	408-412	III
Mar 24	Order to Second Amending Petition filed on behalf of Plaintiff	413	III
Mar 31	Reasons for Judgment	419-422	III
Apr 1	Citation to Second & Sheriff's Return	423	III
Apr 4	Exception of No Cause of Action and Prematurity filed on behalf of Defendants	424	III
Apr 4	Memorandum in Support of Exception of Prematurity and no Cause of Action	425	III
Apr 4	Motion to Strike filed on behalf of Defendants	426-430	III
Apr 7	(Exception) Peremptory Exception of No Cause of Action to the Reconventional Demand of John D. Price, Brit Busch and Manning F. Billeaud filed on behalf of Defendants	431-433	III
Apr 7	Memorandum of Petitioners Seeking to Have the Exception of Prematurity of the SBS Rue-Bienville 1981 Venture, A Louisiana Partnership in Commendam, as Adopted by John D. Price, Brit Bush and Manning F. Billeaud, Overruled and Dismissed filed on behalf of Plaintiff	434-436	III
Apr 7	Memorandum in Opposition to Motion to Compel Posting of Bond or Security for Cost in Regards to the Motion of John D. Price, Brit Busch and Manning F. Billeaud filed on behalf of Plaintiffs	437-438	III
Apr 7	Memorandum of Petitioners in Opposition to the Twelve Exceptions Filed by SBS-Rue Bienville 1981 Venture, a Louisiana Partnership in Commendam, The Becnel Company, and Thomas R. Becnel filed on behalf of Plaintiffs	439-459	III
Apr 7	Memorandum of Exceptors in Support of Exception of No Cause of Action to the Reconventional Demand of the Becnel Company and	460-468	III

	Thomas R. Becnel filed on behalf of Plaintiffs		
Apr 7	Memorandum of Petitioners Seeking to Have the Exception of SBS-Rue Bienville 1981 Venture, a Louisiana Partnership in commendam, Overruled filed on behalf of Plaintiffs	469-474	III
Apr 7	Memorandum in Opposition to Motion to Compel Posting of Bond or Security for Cost filed on behalf of Plaintiff	475-479	III
Apr 7	Memorandum of Petitioners in Opposition to All Exceptions Urged and Adopted by Reference by John D. Price, Brit Busch and Manning F. Billeaud filed on behalf of Plaintiff	480-482	III
Apr 7	Memorandum of Exceptors in Support of Exception of No Cause of Action to the Reconventional Demand of John D. Price, Brit Busch and Manning F. Billeaud filed on behalf of Plaintiffs	483-488	III
Apr 7	Judgment on Rule	489-490	III
Apr 10	Motion & Order to Enroll Co-Counsel of Record	491-492	III
Apr 11	Notice of Judgment	493	III
Apr 14	Pre Trial Order filed on behalf of Plaintiffs	494-496	III
Apr 24	Letter to Judge Aaron from Plaintiff's Attorney	497-499	III
Apr 24	Judgment	500	III
Apr 24	Judgment	501-502	III
Apr 25	Notice of Judgment	503	III
Apr 25	Notice of Judgment	504	III
Apr 25	Reason for Judgment	505-512	III
May 2	(Answer) Supplemental Answer to Interrogatory No. 8 Propounded to All Adverse Parties filed on behalf of Plaintiff	275-280	II
May 12	Notice of Taking Depositions filed on behalf of Defendants	513-516	III
May 12	Memorandum of Plaintiffs Seeking to Have Exception of No Cause of Action and Prematurity Dismissed and Seeking to Have Motion to Strike Denied	517-519	III
May 15	Motion & Order to Protect Opponent Against Oppressive Discovery Procedure filed on behalf of Plaintiffs	520-522	III
May 15	Memorandum filed on behalf of Plaintiffs	523-524	III
May 16	Objection, Reservation of Rights, and Supplemental Answers to Interrogatories filed on behalf of Plaintiffs	525-540	III
May 16	Memorandum in Support of Exceptions and Motion to Strike filed on behalf of Defendants with Attachments	541-548	III
May 19	Judgment	549	III
May 20	Notice of Judgment	550	III
May 20	Memorandum filed on behalf of Defendants	551	III
May 20	Motion for New Trial filed on behalf of Defendants	552-553	III
May 20	Citation to Rule Nisi & Sheriff's Return	554	III
May 22	(Answer) Supplemental Response to Request for Production of Documents filed on behalf of Plaintiffs with Attachments	288-314	II
May 27	Objection and Reservation of Rights filed on behalf of Defendants	555-556	III
May 27	Request for Production filed on behalf of Defendants	563-564	III
May 30	(Answer) Response to Request for Production with Attachments filed on behalf of Plaintiffs	565-649	III
May 30	Motion for Protective Order, to Compel Discovery, for Appropriate Relief and to Upset Trial Dates filed on behalf of Defendants	650-654	IV
May 30	(Answer) Response to Objection and Reservation of Rights filed on behalf of Plaintiffs with Attachments	557-562	III

May 30	Memorandum in Support of Motion for Protective Order, to Compel Discovery, for Appropriate Relief and to Upset Trial Dates filed on behalf of Defendants	655-656	IV
Jun 6	Reasons for Judgment	657-660	IV
Jun 6	Notice of Reasons for Judgment	661	IV
Jun 27	Judgment	662	IV
Jun 27	Order for Protective Order with Attachments	663-701	IV
Jun 30	Motion & Order to Consolidate Cases filed on behalf of Defendants	702-705	IV
Jun 30	Memorandum in Support of Motion to Consolidate Cases filed on behalf of Defendants	706	IV
Jul 1	Notice of Judgment	708	IV
Jul 7	Rule for a Protective Order to Compel Discovery and for Expenses filed on behalf of Plaintiffs	709-716	IV
Jul 9	Citation to Rule Nisi & Sheriff's Return	717	IV
Jul 10	Rule to Show Cause filed on behalf of Plaintiffs	718-719	IV
Jul 10	Order to Rule to Show Cause filed on behalf of Plaintiffs	720-721	IV
Jul 23	Citation to Rule Nisi & Sheriff's Return (2)	722-723	IV
Jul 24	Opposition to Motion for New Trial filed on behalf of Defendants	724-725	IV
Jul 24	Affidavit of Patrick Gros filed on behalf of Defendants	726-727	IV
Jul 24	Motion to Continue filed on behalf of Defendants	727-729	IV
Jul 25	Letter to Clerk of Court from Defendants Attorney with Attachments	730-733	IV
Aug 6	Order for Extension	734	IV
Aug 6	Motion & Order to Extend Deadline filed on behalf of Defendants	735-737	IV
Aug 11	Memorandum in Support of Defendants' Position in the Outstanding Motion with Attachments filed on behalf of Defendants	738-757	IV
Aug 14	Motion & Order filed on behalf of Plaintiffs	758-759	IV
Aug 18	(Memorandum) Index to Memorandum & Memorandum with Attachments filed on behalf of Plaintiffs	760-817	IV
Aug 19	Deposition of Steven J. Dupuis, Sr. with Attachments	818-843	IV
Aug 22	Motion & Order to Designate Cousel filed on behalf of Defendants	844-846	IV
Aug 27	Motion & Order to Dismiss Peremptory Exception of no Cause of Action to the Reconventional Demand filed on behalf of Plaintiffs	847-848	IV
Aug 27	Answer to Reconventional Demand filed on behalf of Plaintiffs	203-204	IV
Aug 28	Motion & Order to Set for Contradictory Hearing filed on behalf of Defendants	849-851	IV
Sept 4	Motion & Order to Extend Deadlines filed on behalf of Defendants	852-854	V
Sep 9	Reasons for Judgment	855-856	V
Sep 10	Rule to Show Cause filed on behalf of Plaintiffs with Attachments and Order	857-863	V
Sep 10	Memorandum in Support of Request for Reconsideration of Motion for New Trial with Attachments filed on behalf of Plaintiffs	864-870	V
Sep 11	(Memorandum) Supplemental Memorandum in Support of Original Motion for New Trial and in Support of Ruling of September 8, 1986 filed on behalf of Plaintiffs with Attachments	871-875	V
Sept 12	Opposition to Request for Reconsideration filed on behalf of Defendants	876-877	V
Sept 15	Citation to Rule Nisi & Sheriff's Return	878	V
Oct 16	Notice of Deposition filed on behalf of Plaintiffs	879	V

Oct 16	Exception of Prescription filed on behalf of Defendants	880-881	V
Oct 16	Memorandum in Support of Exception of Prescription filed on behalf of Defendant	882	V
Oct 16	(Answer) First Amended Answer filed on behalf of Defendants	198-200	V
Oct 16	Motion & Order to Extend Deadlines filed on behalf of Defendants	883-885	V
Oct 20	Answer to Second Supplemental Petition filed on behalf of Defendants	414-415	III
Oct 20	Introduction to Witness and Exhibits List filed on behalf of Defendants	886-887	V
Oct 20	(List) Witness List filed on behalf of Defendants	888-889	V
Oct 20	(List) Exhibits List filed on behalf of Defendants	890-891	V
Oct 20	(List) Witness and Exhibit List Pursuant to Pre Trial Order filed on behalf of Plaintiffs	892-894	V
Oct 21	(Motion) Ex Parte Motion for Protective Order filed on behalf of Plaintiffs with Attachments	895-900	V
Oct 22	Order to Ex Parte Motion for Protective Order filed on behalf of Plaintiffs	901	V
Oct 23	Motion & Order to Quash filed on behalf of Defendants with Attachments	902-906	V
Oct 24	(List) Amended Witness List filed on behalf of Defendants	907	V
Oct 27	(Motion) Ex Parte Motion & Order for Protective Order filed on behalf of Defendants	908-911	V
Oct 27	Notice of Ex Parte Motion & Sheriff's Return	912	V
Oct 28	(Motion) Ex Parte Motion & Order for Protective Order filed on behalf of Defendants	913-916	V
Oct 29	(Memorandum) Pre Trial Memorandum filed on behalf of Defendants	917-934	V
Nov 3	Deposition of Steven J. Dupuis, Sr. with Attachments Exhibit I	935-960	V
Nov 4	(Minute Entry) Oral Minute Entry	961	V
Nov 7	Request for Production filed on behalf of Defendants	962	V
Nov 7	Interrogatories Propounded to All Petitioners to be Answered Categorically, In Writing, Under Oath and According to Law filed on behalf of Defendants	963-965	V
Nov 7	Notice of Deposition filed on behalf of Defendants	966-967	V
Dec 9	Motion & Order to Set Preferential Hearing on Rules to Show Cause Directed to All Defendants and Motion to Set the Trial on the Merits of This Matter by Preference or Alternatively Why the Rules and Trial on the Merits Should Not Be Fixed by Priority to be Heard before the Honorable Marcus A. Broussard, Jr., Judge Ad Hoc filed on behalf of Plaintiffs.	968-971	V
Dec 15	Citation to Rule Nisi & Sheriff's Return	972	V
Dec 16	Letter from Defendants to Plaintiffs dated December 10, 1986	973-974	V
Dec 18	Order filed on behalf of Defendants	975	V
Dec 22	(Memorandum) Pre Trial Memorandum filed on behalf of Defendants with Attachments	976-1057	V
Dec 22	Letter to Plaintiffs from Defendants dated December 18, 1986	1058	VI
Dec 29	Memorandum in Support of Rule to Set Priority Hearing on Rules to Show Cause Directed to All Defendants and Rule to Set the Trial on the Merits of this Case by Priority or Alternatively Rule to Show Cause Why the Rules and Trial on the Merits Should Not be Fixed by Priority to be Heard the Honorable, Marcus A. Broussard, Judge Ad Hoc filed on behalf of Plaintiffs	1059-1063	VI
Dec 30	Letters to Be Filed into the Record filed on behalf of Plaintiffs	1182-1197	VI
Dec 30	Letters to Be Filed into the Record filed on behalf of Plaintiffs	1198-1214	VI

1988

Jan 5	Attachments to Be Attached to the Memorandum in Support of Rule to Set Priority Hearing on Rules to Show Cause filed on behalf of Plaintiffs	1064-1181	VI
Feb 26	Notice of Taking Deposition filed on behalf of Defendants	1215-1216	VI
Mar 11	Notice of Taking Depositions filed on behalf on Defendants	1217-1218	VI
Mar 20	(Answer) Second Amended Answer filed on behalf of Defendants	201-202	II
Mar 24	Citation to Rule Nisi & Sheriff's Return	1219	VI
Apr 7	Request for Production filed on behalf of Defendants	1220-1221	VI
Apr 8	Notice of Taking Deposition filed on behalf of Defendants	1222-1223	IV
May 6	Judgment	1224	VI
May 11	Notice of Judgment	1225	VI
May 12	Motion & Order to File Supplemental And Amending Answer filed on behalf of Defendants	1226-1228	VI
May 12	(Answer) Amended Answer filed on behalf of Defendants	416-418	III
May 13	Exception of Prescription and to Exclude Evidence filed on behalf of Defendants	1229-1230	VI
May 13	Memorandum in Support of Exception of Prescription and Motion to Exclude Evidence filed on behalf of Defendants	1231-1232	VI
May 18	Order to Pre Trial Conference	1233-1234	VI
May 22	Interrogatory filed on behalf of Plaintiffs	1235	VI
May 26	Motion & Order to Limit Testimony filed on behalf of Defendants	1238-1239	VI
May 29	Answer to Interrogatories filed on behalf of Defendants	1236-1237	VI
Jun 1	(Appeal) Motion for Appeal or Alternatively, Notice of Intention to Apply for Alternative Writs of Prohibition, Certiorari and Mandamus filed on behalf of Plaintiffs	1240-1241	V

No. 88-288 (3)

Supreme Court, U.S.
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88-282 In The

Supreme Court of the United States

October Term, 1987

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW RESTATED

1. Whether the Seventh Circuit Court of Appeals properly determined that petitioner failed to satisfy the most basic threshold of ripeness in that "Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity..."? *See Unity Ventures v. Lake County*, 841 F. 2d 770, 775 (7th Cir. 1988).

2. Whether, even if Petitioner's claims were ripe, the Seventh Circuit's decision should be affirmed based on the finding of the District Court that "A painstaking review of the record establishes that...[petitioner] utterly failed to meet the burden of showing that the defendants' reasons were either pretextual or not reasonably related to a legitimate government purpose or concern"? *See Unity Ventures v. County of Lake*, 631 F. Supp. 181, 200 (N.D. Ill. 1986).

3. Whether the Seventh Circuit Court of Appeals properly determined that petitioner's antitrust claim was barred by the state action doctrine?

4. Whether the District court properly granted judgment and judgment N.O.V. for all defendants on all counts?

STATEMENT REQUIRED BY RULE 28.1

Respondents Village of Grayslake and County of Lake are municipal corporations that have no parent companies, nor any affiliates or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW RESTATED i

STATEMENT REQUIRED BY RULE 28.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. PETITIONER'S STATEMENT OF THE FACTS MISCHARACTERIZES THE NATURE OF THE CASE 2

A. There Was Nothing Improper About the Sewer Agreement Between Lake County and Grayslake 2

B. Petitioner Failed To Obtain Any Decision From Anyone 4

C. There Is a Reason Petitioner Did Not Seek a Decision 8

D. This Is Not a Case of Excluding Low Income Housing 10

E. The Limited Capacity of the Northeast Central System and Round Lake Park's Lack of Rational Planning Were the Real Problems 12

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT 14

A. The Seventh Circuit's Decision Is Fully Consistent With This Court's Ripeness Decisions 14

Page

B. There Is No Inconsistency Between the Seventh Circuit's Decision and This Court's Post-*Williamson* Decisions 20

C. This Case Presents No Exhaustion Issue 21

III. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE SEVENTH CIRCUIT'S APPLICATION OF THE RIPENESS DOCTRINE TO BAR PETITIONER'S "AS APPLIED" CHALLENGE 21

A. Petitioner Has Failed To Cite Decisions of the First, Tenth and Eleventh Circuit Courts. Both Those Decisions and the District Court Opinions From Those Circuits That Petitioner Does Cite Are Consistent With the Seventh Circuit's Decision 21

1. There Is No Conflict With the First Circuit 22

2. There Is No Conflict With the Tenth Circuit 23

3. There Is No Conflict With the Eleventh Circuit 24

B. The Second, Third, Fourth, Fifth and Eighth Circuit Decisions Cited by Petitioner Do Not Address the Ripeness Issue Decided by the Seventh Circuit 24

1. There Is No Conflict With the Second Circuit 24

2. There Is No Conflict With the Third Circuit 25

Page

3. There Is No Conflict With the Fourth and Fifth Circuits 26

4. There Is No Conflict With the Eighth Circuit 26

C. There Is No Conflict With the Ninth Circuit 27

IV. THE SEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT N.O.V. ON PETITIONER'S ANTITRUST CLAIM 28

A. The Antitrust Claim Was Not Ripe 28

B. Petitioner's Claim Is Barred by the State Action Doctrine 29

CONCLUSION 29

TABLE OF AUTHORITIES

Cases — Page(s)

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 18

ACORN v. City of Tulsa, 835 F. 2d 735 (10th Cir. 1987) 22-23

Agins v. City of Tiburon, 447 U.S. 255 (1980) . . 16-17, 19, 28

Airtex Products, Inc. v. Pollution Control Board, 15 Ill. App. 3d, 238, 303 N.E. 2d 498 (5th Dist. 1973), *aff'd*, 60 Ill. 2d 204, 326 N.E. 2d 406 (1975) 3

Bello v. Walker, 840 F. 2d 1124 (3d Cir. 1988) 24-25

Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987) 21-22

Congress of Industrial Organizations v. McAdory, 324 U.S. 472 (1945) 15

Corn v. City of Lauderdale Lakes, 816 F. 2d 1514 (11th Cir. 1987) 22, 24

Culebras Enterprises Corp. v. Rivera Rios, 813 F. 2d 506 (1st Cir. 1987) 22

First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) 20

Herrington v. County of Sonoma, 834 F. 2d 1488 (9th Cir. 1987) 27-28

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) 17, 19

International Longshoremen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954) 15

Cases *Page(s)*

Kinzli v. City of Santa Cruz, 818 F. 2d 1449, *modified*, 830 F. 2d 968 (9th Cir. 1987), *cert. denied* 108 S. Ct. 775 (1988) 27-28

LaSalle National Bank of Chicago v. County of DuPage, 777 F.2d 377 (7th Cir. 1985) 11

Lemke v. Cass County, 846 F.2d 469 (8th Cir. 1987) 27

Lerman v. City of Portland, 675 F. Supp. 11 (D. Me. 1987) 21-22

Littlefield v. City of Afton, 785 F. 2d 596 (8th Cir. 1986) 24, 26-27

MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) 15, 17-18, 22, 27-28

Mitchell v. Mills County, 847 F. 2d 486 (8th Cir. 1988) 24, 26

Neiderhiser v. Borough of Berwick, 840 F. 2d 213 (3d Cir. 1988) 24-25

Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) 20

Oberndorf v. City and County of Denver, 653 F. Supp. 304 (D. Colo. 1986) 21-22

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983) 18-19

Patrick v. Burget, 108 S. Ct. 1658 (1988) 28-29

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 21

Cases — *Page(s)*

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 17

Pennell v. City of San Jose, 108 S. Ct. 849 (1988) 18-20

Plakas v. County of Middlesex, noted 803 F. 2d 714 (4th Cir. 1986) (op. not for pub.; text in Westlaw) 26

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 15

Scott v. Greenville County, 716 F. 2d 1409 (4th Cir. 1983) 24, 26

Suburban Trails, Inc. v. New Jersey Transit Corp., 800 F. 2d 361 (3d Cir. 1986) 25-26, 29

Sullivan v. Town of Salem, 805 F. 2d 81 (2d Cir. 1986) 24-25

Suthoff v. Yazoo County Industrial Development Corp., 637 F. 2d 337 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982) 24, 26

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 29

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 15

Unity Ventures v. County of Lake, 841 F. 2d 770 (7th Cir. 1988), *aff'g*, 631 F. Supp. 181 (N.D. Ill. 1986) . . . i, *passim*

Upah v. Thornton Development Auth., 632 F. Supp. 1279 (D. Colo. 1986) 21-22

Cases *Page(s)*

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 15, 17-18, 21-24, 26, 28

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 29

Constitutional Provisions

U.S. Constitution, First Amendment 23

U.S. Constitution, Fifth Amendment ... 17-20, 22, 24, 26, 28

U.S. Constitution, Fourteenth Amendment .. 17-20, 22, 24-28

Statutes

Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U.S.C. §1983 21

Illinois Open Meetings Act, Ill.Rev.Stat. ch. 102, §§ 41-46 (1987) 5-6

Ill. Rev. Stat. ch. 24, §§3-11-14 and 3-12-2 (1987) 5

Sherman Antitrust Act, § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. §1 29

Miscellaneous

Crain's Chicago Business, August 29, 1988 11

In The
Supreme Court of the United States
October Term, 1987

No. 88-288

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT

Recognizing an advocate's obligation to portray facts most favorably to his client, petitioner's statement of the "facts" nevertheless conveys a seriously distorted picture of the case. Respondents address the most serious distortions in Part I of their argu-

ment.

Petitioner's summaries of the District and Circuit Court opinions are also distorted. In essence, the District Court, after erroneously denying respondents' pre-trial motion to dismiss for lack of ripeness, granted respondents' post-trial motion for judgment N.O.V. on the basis that petitioner "utterly failed" to prove any violation of either the civil rights or antitrust laws. Pet. 75a.

The Seventh Circuit held that the trial court erred in even letting the case proceed to trial because "[petitioner] failed to make any effort to obtain a final, reviewable decision before any governmental entity...." Pet. 10a.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S STATEMENT OF THE FACTS MISCHARACTERIZES THE NATURE OF THE CASE

A. There Was Nothing Improper About the Sewer Agreement Between Lake County and Grayslake

Petitioner does not challenge the facial validity of the Grayslake sewer agreement. Pet. 14a. There is no basis for such a challenge. Judge Bua, the trial judge, found that the agreement was valid under Illinois law and executed for constitutionally proper purposes. Pet. 55a, 78a, 87a-88a. Nevertheless, in an effort to get his case before this Court, petitioner attempts to cast the agreement in a sinister light. Petitioner refers to it as "previously undisclosed," as containing a "veto power [that] was absolute and not subject to any prescribed standards," and as being unlike other sewer agreements executed by Lake County. Pet., p. 6.

None of this innuendo finds support in the record. The Grayslake agreement, PX 30, along with numerous similar agreements, DX 135a-135-jj, was executed as part of, and as a requirement of, a federal clean water program designed to replace numerous, inadequate village sewer plants with a system of large regional plants, Tr. 79-83. Prior to regionalization,

Grayslake operated its own sewer plant and, under Illinois law, this gave it some control over development in areas immediately surrounding its boundaries. Tr. 154-55; Pet. 78a. To induce Grayslake to participate in the regional system, Lake County agreed to allow the village, like many other municipalities, to retain some of this control through a "sphere of influence" provision in its agreement. Tr. 153-58; DX D; Pet. 76a-77a.

This "sphere of influence" provision, which petitioner now characterizes as a standardless "veto," said simply:

> The county shall preserve the function of the county interceptors located within the sphere of the village...by not permitting any direct connection thereto...unless the village consents in writing to such direct connection.

PX 30, p. 8. Thus, by its terms, the agreement limited Grayslake's right to withhold its consent to situations in which (1) a direct connection (*i.e.* a large connection, too large to connect through any existing system's connection) to the interceptor sewer that Grayslake had contracted to use (2) threatened the functional ability of that interceptor to provide that contractual service. Those standards are perfectly sufficient under Illinois law, *Airtex Products, Inc. v. Pollution Control Board*, 15 Ill. App. 3d 238, 242-43, 303 N.E.2d 498, 502 (5th Dist. 1973), *aff'd*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).[1]

Eight other Lake County sewer agreements had provisions similar to the Grayslake "sphere of influence" provision. *See* DX D, 135b, 135v, 135x, 135cc, 135dd, 135gg, and 135jj. All of these agreements, including the Grayslake agreement, were approved at formal public meetings of the Lake County Board and the other governments involved. *Id.* All were subjected to extensive legal review before being executed.[2]

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[1] Judge Bua rejected petitioner's "veto" claim and found this provision was intended to, and did, foster intergovernmental cooperation. Pet. 74a-80a.

[2] Petitioner alludes to the fact that the agreement was reviewed by a lawyer who, years after it was executed, questioned its validity. Pet., p. 7. That lawyer

(Footnote continued on the following page)

B. Petitioner Failed To Obtain Any Decision From Anyone

Petitioner had one private meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service. There is not one iota of evidence to show that petitioner thereafter ever lifted a finger to obtain public sewer service. Neither before nor after that meeting did petitioner ever file a formal application or follow any formal procedures to obtain service.

Illinois law required that a formal Illinois Environmental Protection Agency ("IEPA") application had to be completed and approved by Lake County before petitioner could connect to the county interceptor. Tr. 144-46, 357-58; DX 228, ¶6.5. Under the Grayslake sewer agreement, PX 30, p. 8, Lake County was contractually bound to disapprove direct connections to the sewer serving Grayslake (the "Northeast Central system") if, but only if, the connection would impair the system's functional ability to serve Grayslake. Any direct connection that would impair that ability required Grayslake's written consent. *Id.*

Lake County's staff advised petitioner that he had to file the formal IEPA application. DX 54. If the IEPA application had been filed, Lake County would have been required to certify as to whether or not the Northeast Central system had adequate capacity to accomodate petitioner's proposed development. Tr. 144-46, 357-58; DX 228, ¶6.5. Nevertheless, the unrefuted evidence shows that petitioner made a conscious decision not to file that application because he did not want to spend the money it would cost to develop the necessary engineering data. Tr. 755, 757; DX 228, ¶5.1.[3]

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2 *(Continued)*
was a first-year associate attorney. However, the evidence at trial showed that the agreement had also been reviewed by several experienced municipal and bond attorneys before it was executed, with no question concerning its legality. DX 33, 38, 41, and 44; Tr. 152-53, 219, 222, 1323-25, 1338-40, 1352, 1451-54, and 1458-63.

[3] In lieu of the required application, petitioner provided only two sketchy maps, PX 48, showing proposed alternative sewer lines originating in empty country-

(Footnote continued on the following page)

Because petitioner refused to file the IEPA application, he never obtained *any* decision from Lake County concerning the adequacy of the system to accomodate his proposed development. Furthermore, because he never supplied any data that would allow Lake County to decide whether or not his development would impair the system's functional ability to serve Grayslake, the Lake County Board was never in a position to decide whether or not Grayslake's written consent to the connection was required.[4]

If the consent of Grayslake had been required, it is clear that only the Grayslake Board of Trustees, and not the Mayor of Grayslake, could give that consent. Under Illinois law, a village mayor does not have the right (except in special circumstances) even to vote on matters brought before the village board, much less the right to bind the village by comments made at a private meeting with a developer. Ill. Rev. Stat. ch. 24, §§3-11-14 and 3-12-2. Furthermore, under Illinois law, village boards cannot make any final decision about anything except at a properly noticed public meeting called for the purpose with a quorum in attendance. *See* Illinois Open Meetings Act, Ill. Rev. Stat. ch. 102, §§41-46.

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3 *(Continued)*
side. As petitioner's witness William Byers observed, looking at the only documentation petitioner ever prepared, "[t]his particular map here, I wouldn't even know what it is." Tr. 382. In submitting that documentation to Lake County's staff, petitioner's own engineer acknowledged that "detailed plans for submittal" had yet to be prepared. DX 180. In reacting to those plans, the Lake County staff referred to them as "conceptual" and advised petitioner of the need to submit "detailed engineering documents...as part of the Illinois EPA permit process." DX 54.

[4] Petitioner asserts that the Lake County Board refused to repudiate the Grayslake agreement. Pet., p. 7. In fact, not even that issue ever came before the full Lake County Board; it was discussed only by the Board's Public Service Committee. Petitioner, however, did not appear at that meeting, Tr. 1536-37, and never sought to take the issue to the full County Board, Tr. 852-53. In any event, a decision not to repudiate the agreement hardly qualifies as a decision to deny petitioner a sewer connection pursuant to the agreement. Neither the Lake County Board nor its Public Service Committee was ever presented a specific proposal or made any decision rejecting a connection for petitioner.

Petitioner, however, would encourage the violation of these "government in the sunshine" provisions by arguing that his private, evening meeting with one, non-voting member of the Grayslake Board is sufficient to constitute final action binding the Village. But, under Illinois law, nothing that was said at that private meeting could bind the Village to anything or deny petitioner of anything. Indeed, it would be most troublesome if the federal courts were to ignore the Illinois Open Meetings Act by holding that petitioner could rely on that meeting. Such a decision would only encourage developers and others to avoid debate in the public forum in favor of "one-on-one" private meetings with elected officials.

The plain fact is that petitioner should have sought formal approval of the Grayslake Board at a regular public meeting because, as the Seventh Circuit found:

> If [petitioner] had presented a formal application to the Grayslake Board of Trustees with adequate documentation about the density of the proposed development and the anticipated volume of sewage the connection would have to accommodate, then the Village could have made a reasonable decision about the Northeast Interceptor's ability to handle the excess.

Pet. 12a. The purpose of forcing formal compliance is clear and important. Until squarely faced with a decision that must be made *and with all the supporting evidence*, it is too easy for the responsible agency to avoid facing the issue. Like any free advice, a preliminary, informal reaction, based on incomplete data, is worth what you pay for it. If petitioner wanted a firm and final decision, he had an obligation to present his case. He refused to present his evidence to the local decisionmakers and, thus, it is not surprising that he did not get a decision.

Having refused to apply for a formal decision, petitioner now tries to excuse that refusal by claiming that, ". . . in Illinois there is no formal procedure for obtaining a connection to a public sewer." Pet., p. 19. That statement is blatantly inaccurate. The Seventh Circuit has so found. Pet. 11a-12a.

The Lake County IEPA application procedure has already

been discussed. There is no mystery about it. The forms are in the record. DX 228. Nor is there any mystery about how you get a decision from the Grayslake Board of Trustees.

Petitioner portrayed himself as a sophisticated developer who knew how to get things done. Tr. 651, 693. He certainly knew that if you want a village board to decide something, you ask to have it put on the agenda of a public meeting–or, if that's too hard, you stand up at one of the board's regular meetings and ask for a decision. That's how it works everywhere, and that's how it works in Grayslake. Tr. 1464-65. Petitioner, however, did nothing. Tr. 1480-81. Petitioner concedes that he never presented his sewer connection proposal to the Grayslake Village Board and never even sought to appear before the Board. Tr. 851.[5]

Petitioner is thus left to rely on that one brief, informal meeting he had with Grayslake's Mayor. But even if Illinois law allowed such reliance, it is plain that even what the Mayor said was not in any sense "final."

When petitioner met with Mayor Schroeder, Grayslake was evaluating a possible annexation of the "Heartland" project, a proposed 2,500 acre development. According to the Mayor's uncontroverted testimony, Grayslake wanted to evaluate the sewer capacity requirements involved before deciding whether there was sufficient capacity to accomodate petitioner's connection. Tr. 268-69. Under questioning by petitioner's counsel, Mayor Schroeder said:

> ...we had to find out what the use would be of the

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[5] The minutes of the February 21, 1981 Grayslake Village Board meeting, PX 145, illustrate how simple it was to bring a matter before the Board. Those minutes recorded under the heading "Audience," that "Barbara Bye presented a letter signed by the residents of the Garfield and Lincoln areas requesting the installation of a street light." The minutes also record that "Trustee Smith moved to approve the request of the American Unit of Home Bureau..."; "Trustee Christian moved to approve the request of the Jaycees..."; and that "Trustee Lucus moved to adopt the resolution proposed by the Lake County Regional Plan Commission...."

> potential annexations coming up, and then after we found that out, there would be some intelligent discussions as to what the future capacity would be.

Tr. 269. Petitioner himself testified that Mayor Schroeder said simply that "he didn't know *at what time* that answer would be available." Tr. 753. (emphasis added).

Subsequently, Mayor Schroeder sent a letter, also signed by the members of the Grayslake Village Board, to the Lake County Board. The letter asked that the County Board not repudiate its municipal sewer service agreements. However, the letter also reaffirmed Grayslake's willingness to consider petitioner's request for sewer connections:

> As a matter of record, *Grayslake has never taken the position that it will never consent to the connection by [petitioner's development.* Petitioner] was told that when those [Heartland] developers who are interested in annexing to Grayslake in the area immediately South and East to the Village annex of Grayslake then *consent would be given for the connection if sufficient capacity was available* in the County sewer to absorb development.

PX 111, p. 2 (emphasis added).

The uncontroverted evidence thus shows that the possibility of petitioner obtaining a sewer connection remained an open issue, intertwined with the question of how much future capacity would be available. Because petitioner never prepared and submitted a formal request or otherwise pressed the issue, no decision was ever made.

C. There Is a Reason Petitioner Did Not Seek a Decision

Petitioner is, by self-proclamation, a talented and successful developer who, he says, specializes in finding solutions where others cannot. Tr. 651-52. Why would such a person attend one brief private meeting with the Mayor of Grayslake and then immediately and totally give up his pursuit of regional sewer service? The answer is that he didn't want regional sewer service because it was going to cost him several million dollars to get it,

Tr. 750, and he already had Round Lake Park's agreement to let him use, Tr. 724, a much cheaper, DX 118, 195, 195a (though environmentally unsound, DX 108, p. 2), "package plant" to treat sewage from his development. What is more, he talked Round Lake Park into paying for the package plant, DX 190A, § 8, *and* prohibiting petitioner's competitors from using it, Tr. 762, 843-44. That was a pretty sweet deal.

His problem was that state environmental authorities had already told him that he could not use such a package plant *unless* he could demonstrate that the regional system could not serve his needs. DX 50. And, they told him, *the much greater expense of using the regional system was no excuse. Id.*

So what petitioner needed was an excuse acceptable to Illinois environmental authorities–such as a claim that he had sought and been denied the use of the regional system. Indeed, indisputable documents in the record establish that petitioner's pursuit of his package plant included lying to those state authorities in an effort to convince them that something more than money stood between him and regional sewer service.

Round Lake Park, like Grayslake, had a sewer service agreement with Lake County that gave Round Lake Park the absolute right to send sewage from anywhere in the Village to the regional system known as Northwest system. DX 135x.[6] Petitioner's property was in Round Lake Park. Petitioner was admittedly aware of the Round Lake Park sewer agreement. Tr. 826-27. Indeed, a letter to petitioner from the Mayor of Round Lake Park specifically advised petitioner that the agreement would allow him to pursue his package plant alternative if the County refused to serve him out of the *Northwest* (not Northeast Central) system. DX 185.

At trial, petitioner admitted that he never applied to use the Northwest system. Tr. 887. But despite having never applied

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[6] The agreement gave Round Lake Park no right to use the Northeast Central system that served Grayslake. Similarly, Grayslake had no right to use, or to prevent the use of, the Northwest system that served Round Lake Park.

to use that system, petitioner repeatedly lied to state agencies by claiming that he had been denied access to *both* the Northeast Central *and* the Northwest systems. DX 239, 239A, 189 at 1, 214, 216, and 215. In truth, however, the only thing that prevented petitioner's use of the Northwest system was his own desire for a less expensive alternative. *See* Tr. 750.[7]

Thus, it is Petitioner's desire for state approval of the cheap, exclusive package plant, Tr. 750; DX 118, 195a, that explains his half-hearted request to use the Northeast Central system and his total failure to pursue a connection to the Northwest system, the regional system that he had a clear right to use and as to which Grayslake had no rights whatever.

D. This Is Not a Case of Excluding Low Income Housing

There was no evidence at trial that any defendant acted out of any personal monetary interest or other venality, or on behalf of any private party or interest or out of any personal or political animosity toward petitioner. On the record, these were honest officials trying to deal with tough problems.

Petitioner has thus been forced to look elsewhere for some colorable claim of motivation for the alleged conspiracy against him. In an apparent effort to do that, petitioner opens his Statement of the case by characterizing himself as a "successful developer of low- and moderate-cost housing and light industrial projects...," Pet., p. 3, and fills his petition with innuendo to the effect that this case involves nothing more than an effort by

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[7] In this Court, petitioner attempts to pass off the Northwest system on the basis that "undisputed testimony had established [petitioner's use of it] would have violated state and federal area assignments...." Pet., p. 14 n. 9. But petitioner offers no citation to that "undisputed testimony." In fact, the only evidence about "area assignements" was presented by respondents and showed that petitioner could have applied for an area boundary change and gained access to the Northwest system. Tr. 1675, 1680; DX DD. Petitioner did not apply, and his *post-hoc* rationalizations for not applying do not explain why, if he had no right to use the Northwest system, he lied about having applied for and been denied such use.

some rich people to keep out some poor people. Not a shred of evidence was offered to support those unfortunate insinuations.

Petitioner's characterizations of his plan, himself and his business have not always been the same as they are here. The development plan that Round Lake Park approved for petitioner included a shopping center, a hotel, an office park, a light industrial park and single family and multiple family housing. DX 35. At the same time petitioner was prosecuting this case, he also was prosecuting another case against several other suburban governments that he alleged were conspiring to prevent him from building *luxury* housing. *LaSalle National Bank of Chicago v. County of DuPage*, 777 F. 2d 377, 382 (7th Cir. 1985). A newspaper interview given by petitioner just last month described:

> [Petitioner's] plans for at least three major downtown projects, the most visible of which will be the world's tallest apartment building, planned for . . . 600 N. Lake Shore Drive that will include a 75-story residential building, an adjacent five-star hotel and an international promenade of retail boutiques.

Crain's Chicago Business, August 29, 1988, pp. 3 and 53. The same article noted that: "In 1987, the company's revenues topped $100 million, with profits up 40% . . . ." *Id.* at 53.

Petitioner's side-by-side charactization, without any citation to the record, of Grayslake as a municipality "ranking among the most affluent in the Chicago metropolitan area," and of Round Lake Park as a "blue-collar community with high unemployment," Pet., p. 5, is equally misleading. The image petitioner seeks to create of great socio-economic differences between the two communities is contradicted by his own evidence. Plaintiff's Exhibit 63 contains 1970 census data for 17 communities within Lake County. Three communities had median incomes ranging from approximately $20,000 to $27,500. In contrast, Grayslake had a median income of only $13,089; Round Lake Park's median income was just slightly less, $11,381. Indeed, ten of the seventeen Lake County communities, including both Grayslake and Round Lake Park, had median incomes within the relatively narrow range of $11,000 to $13,400.

Judge Bua, after a "painstaking review of the record," found no proof of illicit motives of any kind:

> The plaintiffs utterly failed to meet the burden of showing that defendants reasons were . . . pretextual. . . .

Pet. 74a-75a. Rather, Judge Bua found only evidence of legitimate concerns about sewer capacity and rational planning of development in relation to available public services:

> [T]he evidence shows *overwhelmingly* that the sphere of influence is related to a legitimate government purpose or concern . . . the availability and cost of sewer services to Grayslake residents.
>
> * * *
>
> Indeed, there was *overwhelming* evidence presented at trial that Grayslake attempted to achieve such mutual and cooperative planning with Round Lake Park regarding the Heartland and Unity developments.
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> * * *
>
> [T]he Court holds that the evidence presented at trial shows *conclusively* that, not only was Grayslake's denial of sewer services reasonable under the sphere of influence agreement, but also the conditional grant of the Unity property's hook-up in exchange for mutual or cooperative planning of the Heartland development was reasonably related to controlling and mutually planning development lying between Grayslake and Round Lake Park.

Pet. 78a, 85a, 88a (emphasis added).

E. The Limited Capacity of the Northeast Central System and Round Lake Park's Lack of Rational Planning Were the Real Problems

As Judge Bua found, respondents' real concerns were, first, whether the limited sewage treatment capacity available was sufficient to serve petitioner and, second, how that limited capacity should be allocated in light of Round Lake Park's refusal to participate in any rational planning program.

The uncontroverted evidence shows that petitioner's proposed development was not part of capacity projections upon

which the Northeast Central system was designed and built. A letter from the Northeastern Illinois Planning Commission to the Illinois Environmental Protection Agency states:

> The population of the six hundred-acre [petitioner] development. . . *is not included* in the population projections of Northeast Central EPA Facilities Plan.

DX 96 (emphasis added). A report prepared for petitioner by a hired consultant specifically advised petitioner of this fact. DX 74, p. A004582.

It is also uncontroverted that the only sewage treatment plant serving the Northeast Central system simply did not have the capacity to handle the two large developments–petitioner and the Heartland–that were simultaneously seeking to connect to the system. When petitioner met with Grayslake's Mayor in October, 1978, the unused total capacity of the system was 4.18 million gallons per day. DX 116B. The total proposed average flow for petitioner and the Heartland was 4.72 million gallons per day, DX 116 and 116A, more than the *total* unused capacity of the plant. If petitioner and Heartland had obtained commitments for their sewer needs in 1978, there would have been no further capacity available for use in Grayslake or any of the several other communities that were originally intended to be served by that system. Any expansion of that system would have been costly and, even on optimistic assumptions, could not have occurred for almost 10 years. Tr. 372-74.

The foregoing data is the only data in the record regarding the system's capacity. The only evidence petitioner elicited was that no applicant for sewer service was rejected for lack of capacity. Tr. 369-70. That, of course, is precisely because petitioner and Heartland were not able to monopolize the limited capacity that remained in 1978.

These capacity limitations, along with similar problems affecting other public facilities, prompted Lake County and Grayslake to support the idea of a cooperative planning program to deal with these two massive developments. Grayslake voted to approve a planning program recommended by the Northeast Illi-

nois Planning Commission that would enable Grayslake, Round Lake Park and the County to work together toward a solution whereby petitioner and Heartland could be developed sensibly and also receive some sewer capacity. Tr. 1590-91; Pet. 85a-88a. The proposed compromise made perfect sense in light of the capacity concerns. Pet. 87a. Nevertheless, petitioner refused to support the proposal. Tr. 605-620; PX 126. Round Lake Park, after initialling indicating that it would agree to the proposal, repudiated it. Tr. 1466-68.

Petitioner completely mischaracterizes this proposed compromise and attempts to portray it as evidence of respondents' wrongdoing. Pet., p. 8. However, Judge Bua, an objective observer of all the evidence, found that the proposed compromise was "a desired and rational goal." Pet. 87a.[8]

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT

A. The Seventh Circuit's Decision Is Fully Consistent With This Court's Ripeness Decisions

Several recent decisions of this Court have carefully defined the ripeness doctrine in the context of challenges to local land use and development activities. There is nothing difficult or mysterious about the rules established by those cases. The circuit courts have had no great difficulty in applying them. The conflicts alleged by petitioner are manufactured and imagined,

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[8] Petitioner also mischaracterizes challenges by Lake County and Grayslake to (1) his application for IEPA approval of his package plant, Pet., p. 8, and (2) his Round Lake Park zoning, Pet., p. 9. Lake County and Grayslake were only two of at least 18 objectors to petitioner's proposed package plant, including numerous municipalities and the North Shore Sanitary District. DX 97-107, 209-13, 218. Both the Northeastern Illinois Planning Commission ("NIPC") and the Illinois Department of Agriculture refused to recommend it, DX 108 and 110, and approval was denied, DX 113. Similarly, the litigation challenging petitioner's zoning was brought not only by Lake County and Grayslake, but also by a number of other municipalities. DX 114, 115. NIPC had recommended litigation if cooperative efforts to plan failed. Tr. 1591. That litigation is still pending.

not real.

Even if any further refinement of those rules were necessary or appropriate, this would hardly be the case in which to undertake that exercise.

At the outset, it is important to emphasize again that:

> [Petitioners] here assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake. Rather, they challenge the defendants' use of the powers granted them by the contract.

Pet. 14a. The decisions of this Court have uniformly refused to consider "as applied" challenges to regulations that have never been applied to the plaintiff. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *International Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947); and *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 475-76 (1945). Thus, the Seventh Circuit's decision is based squarely on the most basic and well established requirement of the ripeness doctrine: Federal Courts do not entertain "as applied" challenges to regulations that have never been applied to the plaintiff.

This Court's most recent ripeness decisions involving challenges to local land use programs have, of course, required even more than an initial application of the regulation, but no reference to those cases is needed to resolve the instant dispute. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986). The "important questions" that petitioner suggests require the attention of this Court arise, if at all, only at the far periphery of ripeness analysis. They are certainly not presented by this case.

This is not a case in which the facts show that there was a final decision applying a local regulation to petitioner and in which the question is whether petitioner was obligated to go beyond that first denial to seek variances, or to submit alternate applications, or to pursue state remedies for compensation. This

case is much simpler than that.

The Seventh Circuit did not base its determination of prematurity on the petitioner's failure to pursue *all* avenues of relief. Quite to the contrary, the Seventh Circuit found that the petitioner had failed to present *any* formal application that would have provided a basis on which the Court could evaluate the impact and extent of the alleged denial of sewer service:

> Alter's efforts to obtain a sewer connection for the Unity property did not include a formal application to either Grayslake or Lake County, and thus did not result in a final decision. . . . Alter made no formal application to the Village Board of Trustees. Neither did he approach the Lake County Board to apply for a connection. Nor did he file a request with the IEPA to approve a connection to the Northeast Interceptor. . . . Alter . . . never applied for connection to the Northwest Interceptor. Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity on his application for a sewer connection. . . . At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

Pet. 10a, 12a.

A brief summary of this Court's recent land use ripeness decisions will serve to place the Seventh Circuit's decision in proper context. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court found that:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy *regarding the application* of the specific zoning provisions.

Id. at 260 (emphasis added).[9] So in this case, petitioner never submitted a formal request to any of the state or local agencies whose approval he required to connect to the public sewer sys-

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[9] The Court then turned to a consideration of the Agins' facial challenge to the ordinance, but petitioners here raise no such challenge.

tem. Pet. 10a. *Agins* thus disposes of this case.

Williamson, supra, carried the *Agins* ripeness analysis at least two steps forward. In *Williamson,* the Court noted that "[r]espondent has submitted a plan..., and thus has passed beyond the *Agins* threshold." 473 U.S. at 187. However, the Court noted that even the rejection of that initial plan did not constitute a "final decision" sufficient to permit review of an "as applied" taking claim because the property owner could have obtained, but did not apply for, variances. *Id.* at 188-90. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264 (1981). Furthermore, the Court held that the "as applied" taking claim was also not ripe because the property owner had not pursued state compensation remedies. *Id.* at 194.

In *MacDonald, supra,* the Court carried its ripeness analysis yet a step farther. In that case, the court found an "as applied" taking challenge was not yet ripe despite the fact that the property owner had submitted one subdivision proposal and had received a final decision concerning it. The Court concluded that this was not sufficient because the rejection of that proposal did not suggest that *no* proposal would be approved:

> Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.

Id. at 2569 n. 9. *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 136-137 (1978).

The "important issue" that petitioner says *Williamson* left undecided is whether the additional requirements that *Williamson* and *MacDonald* impose beyond the *"Agins'* threshold" do or do not apply to due process and equal protection claims as well as to taking claims. *But see Williamson, supra,* 473 U.S. at 197-200. That question, however, is simply not raised in this case.

For purposes of this case *Agins, Williamson* and *MacDonald* all stand for the same simple, universal proposition of ripeness law: Before an "as applied" challenge to a regulation may be brought, the plaintiff must have made at least one "meaningful

application" and must have pursued it at least to the point of a "final decision" by the "initial decisionmaker." In this case, petitioner made no application, much less a "meaningful one" and, therefore, the governing bodies of the respondent local governments, which alone had authority to act as the "initial decisionmaker," were never called upon to make any decision, much less a "final decision." *Compare Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (a regulation *was* ripe for review where "[t]here is no hint that this regulation is informal...or only the ruling of a subordinate official...or tentative").

The Seventh Circuit simply had no need to, and did not, rely upon the variance, reapplication, and local remedy requirements of *Williamson* and *MacDonald* in deciding that petitioner's "as applied" challenge was premature. The Seventh Circuit required simply that "[a] final decision must be demonstrated by a development plan submitted, considered, and rejected by the governmental entity." Pet. 9a. Petitioner could not pass even that minimal threshold.

And, at that threshold level, it is quite clear that the ripeness requirement applies equally and without distinction to all "as applied" constitutional challenges to regulatory schemes, whether those challenges arise under the takings clause, the due process clause or the equal protection clause. *See Pennell v. City of San Jose*, 108 S. Ct. 849 (1988). *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). In *Pennell*, plaintiffs challenged a rent control ordinance both facially and "as applied" under both the takings clause and the due process clause. This Court held that the facial challenges were ripe for decision but that the "as applied" challenges, whether under the takings clause or the due process clause, were not ripe because the ordinance had never been applied to the plaintiffs.

The Court first considered the takings claim and found that "it would be premature to consider this contention on the present record" because the ordinance had not been applied to the plaintiffs. 108 S.Ct. at 856-57. The Court then turned to similar "as

applied" claims brought under the due process and equal protection clauses and concluded that they, like the taking claim, were not ripe because the ordinance had not been applied to plaintiffs:

> For this reason we also decline to address appellant's contention that application of [the ordinance] violates the Fourteenth Amendment's due process and equal protection requirements.

Id. at 857 n. 5 and 858 n. 7. Despite this finding that both the takings and the due process "as applied" claims were premature, the Court went on to consider the merits of the facial challenge to the ordinance based both on the takings clause and the due process clause. *Id.* at 857-59.

The *Pennell* analysis is completely consistent with this Court's previous treatment of the ripeness issue. The critical distinction–at least at the threshold level of ripeness analysis–is not between claims based on the takings clause and claims based on the due process clause. Rather, the critical distinction is between "as applied" challenges and facial challenges. *See, e.g., Agins, supra,* 447 U.S. at 260 (in the absence of a final decision on an application for development approval, an "as applied" taking claim is not ripe; however, a facial taking claim is ripe); *Pacific Gas, supra,* 461 U.S. at 201 and 203 (statutory provision requiring case-by-case analysis of nuclear storage capacity was not ripe, "because 'we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate'"; however a challenge to a general moratorium provision was ripe because as to it "[t]he question of pre-emption is predominantly legal. . . ."); and *Hodel, supra,* 452 U.S. at 295-96 and 304 (because the regulation had never been applied to plaintiffs, an "as applied" taking claim was not ripe, but plaintiffs' facial taking claim could be adjudicated; because civil penalty provisions had never been applied to plaintiffs, plaintiffs' "as applied" due process challenge was not ripe).[10]

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[10]Although petitioner raised no facial challenge to the Grayslake agreement,

(Footnote continued on the following page)

B. There Is No Inconsistency Between the Seventh Circuit's Decision and This Court's Post-*Williamson* Decisions

Petitioner's claims that the Seventh Circuit's decision is inconsistent with this Court's decisions in *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); and *Pennell v. City of San Jose*, *supra*, are completely unfounded.

Nollan involved no ripeness issue whatever. The passage quoted by petitioner, Pet., p. 24, dealt with the standard of rationality, not the standard of ripeness, to be applied in takings and due process cases. *Nollan*, *supra*, 107 S. Ct. at 3147 n.3.

First English involved neither a ripeness issue, a taking issue nor a due process issue; it involved only a remedy issue. The Court found that the unusual procedural posture of the case squarely presented the remedy issue without the need for the Court to determine whether a taking had actually occurred and was ripe for review. *First English*, *supra*, 107 S. Ct. at 2383-84.

As already discussed, the Seventh Circuit's decision is fully consistent with *Pennell*. Petitioner is simply incorrect in claiming that *Pennell* distinguished between takings claims and due process claims, Pet., p. 25; *Pennell* distinguished between facial and "as applied" claims and, within those categories, applied the ripeness doctrine in exactly the same way whether the claim arose under the takings clause or the due process clause. *Pennell*, *supra*, 108 S. Ct. at 856-57, 857 n. 5 and 858 n. 7.

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10 *(Continued)*
the District Court, in effect, decided and rejected such a challenge on the way to deciding the "as applied" challenge. The first step in Judge Bua's "as applied" analysis was to analyze the constitutional reasonableness of the agreement. Pet. 74a-80a. The court concluded: "[T]he evidence shows overwhelmingly that the sphere of influence is related to a legitimate government purpose or concern." *Id.* at 78a.

C. This Case Presents No Exhaustion Issue

Petitioner's suggestion that the Seventh Circuit's decision conflicts with this Court's repeated holding that exhaustion of state remedies is not a prerequisite to actions under §1983 is plainly frivolous. As this Court so succinctly said in *Williamson*:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial...review.... *Patsy* concerned the latter, not the former.

Williamson, supra, 473 U.S. at 193 (construing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

In this case, petitioner never gave the "initial decisionmaker" an opportunity to make a decision. This case, therefore, presents no question concerning his obligation to exhaust state procedures for the review of such an initial decision.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE SEVENTH CIRCUIT'S APPLICATION OF THE RIPENESS DOCTRINE TO BAR PETITIONER'S "AS APPLIED" CHALLENGE

A. Petitioner Has Failed To Cite Decisions of the First, Tenth and Eleventh Circuit Courts. Both Those Decisions and the District Court Opinions From Those Circuits That Petitioner Does Cite Are Consistent With The Seventh Circuit's Decision

For the proposition that the First, Tenth and Eleventh Circuits are in conflict with the Seventh Circuit's decision in this case, petitioner cites only district court opinions from those circuits. *See Lerman v. City of Portland*, 675 F. Supp. 11 (D. Me. 1987); *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986); *Upah v. Thornton Development Auth.*, 632 F. Supp. 1279 (D. Colo. 1986); and *Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987). In each case, however, petitioner has failed to advise this Court of Courts of Appeals decisions in

those Circuits that are entirely consistent with the Seventh Circuit's decision in this case. *See Culebras Enterprises Corp. v. Rivera Rios*, 813 F. 2d 506 (1st Cir. 1987); *ACORN v. City of Tulsa*, 835 F. 2d 735 (10th Cir. 1987); and *Corn v. City of Lauderdale Lakes*, 816 F. 2d 1514 (11th Cir. 1987).[11]

1. There Is No Conflict With the First Circuit

In *Culebras*, *supra*, the First Circuit specifically held that the *Williamson* ripeness doctrine applied to defeat plaintiff's due process claim for damages resulting from the adoption of a zoning ordinance that allegedly prevented the development of plaintiff's property. 813 F. 2d at 515-16. This result was reached despite the fact that, in *Culebras*, the local government had officially acted not only to adopt the challenged zoning ordinance but also to deny the plaintiff's subsequent request for administrative relief from that zoning ordinance. *Id.* at 509. In contrast, in this case, the respondent local governments have never taken any official action whatever with regard to petitioner.

There is obviously no conflict between *Culebras* and the Seventh Circuit's decision in this case. Furthermore, however, it is also clear that the *Culebras* court was dealing at at least the second or third level of ripeness analysis under *Williamson* and *MacDonald* while the Seventh Circuit had no occasion to go beyond

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[11]It should also be noted that there is no inconsistency between the Seventh Circuit's decision in this case and any of the District Court cases cited by petitioner. In each of those cases, the "initial decisionmaker" had arrived at a "final decision" that carried the plaintiff past the threshold of ripeness. In *Lerman*, *supra*, the challenged official action was the already completed demolition of a building without affording its owner procedural due process prior to the demolition. In *Oberndorf*, *supra*, the challenged activity was the city council's formal adoption of an urban renewal plan designating the plaintiff's property as blighted. In *Upah*, *supra*, five separate official actions, all formally approved by the local governing body, were alleged to violate the plaintiff's constitutional rights. In *Carroll*, *supra*, the court expressly noted that the defendants did not challenge "plaintiff's allegation that the defendants' actions are administratively final. . . ." 653 F. Supp. at 942 n. 12. The court dismissed the taking claim solely because plaintiff had failed to exhaust an adequate state compensation remedy under the second prong of the *Williamson* test. *Id.* at 942.

the threshold question of "whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson, supra*, 473 U.S. at 193.

2. There Is No Conflict With the Tenth Circuit

In *ACORN, supra*, as in this case, the plaintiff ACORN had been given indications by subordinate public bodies and their staffs that its request to use a public park would not be approved. However, under applicable local law, only the City Board of Commissioners had authority to officially make that decision. ACORN, however, never asked the Board of Commissioners to authorize its activity. 835 F.2d at 737-38.

Under these facts, the Tenth Circuit declined to consider ACORN's "as applied" challenges to the ordinance in question because the ordinance "...has not been applied to *ACORN*." *Id.* at 744. The Tenth Circuit did, however, note that ACORN's facial challenge was ripe because "a first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *Id.* at 740. In so holding, the court carefully distinguished between the application of the ripeness doctrine to facial challenges and its application to "as applied" challenges:

> We emphasize, however, that our holding that ACORN has standing to challenge these ordinances and that this case is ripe for decision does not expand the substantive issues that we should address beyond those appropriate to a challenge to the facial validity of the ordinances.

Id. In the present case, of course, petitioners "assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake." Pet. 14a. The Seventh Circuit properly concluded that petitioner's "as applied" challenge is not ripe for the same reason that the Tenth Circuit concluded that ACORN's "as applied" challenge was not ripe: There has been no decision by the only body authorized to make the decision.

3. There Is No Conflict With the Eleventh Circuit

In *Corn*, *supra*, the Eleventh Circuit expressly interpreted the second prong of *Williamson* (failure to pursue a state compensation remedy) as making no distinction, for ripeness purposes, between due process claims and taking claims. 816 F. 2d at 1516 n. 2. Here, once again, the Eleventh Circuit's ripeness analysis proceeds at a level that the Seventh Circuit was never required to reach, but certainly that analysis is in no way inconsistent with the Seventh Circuit's decision.

B. The Second, Third, Fourth, Fifth and Eighth Circuit Decisions Cited by Petitioner Do Not Address the Ripeness Issue Decided by the Seventh Circuit

In support of its position that the Second, Third, Fourth, Fifth and Eighth Circuits disagree with the Seventh Circuit's interpretation of *Williamson*, petitioner cites seven opinions, most of which do not even mention *Williamson* or ripeness. *See Sullivan v. Town of Salem*, 805 F. 2d 81 (2d Cir. 1986); *Neiderhiser v. Borough of Berwick*, 840 F. 2d 213 (3d Cir. 1988), and *Bello v. Walker*, 840 F. 2d 1124 (3d Cir. 1988); *Scott v. Greenville County*, 716 F. 2d 1409 (4th Cir. 1983); *Suthoff v. Yazoo County Industrial Development Corp.*, 637 F. 2d 337 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); and *Mitchell v. Mills County*, 847 F. 2d 486 (8th Cir. 1988), and *Littlefield v. City of Afton*, 785 F. 2d 596 (8th Cir. 1986).

1. There Is No Conflict With the Second Circuit

Petitioner's treatment of *Sullivan*, *supra*, is, to put it charitably, deceptively confused. In a single paragraph, petitioner weaves together random quotes from different sections of the opinion to give the appearance that the Second Circuit said just the opposite of what it actually said. *Sullivan* does not even mention ripeness. However, what it does say supports respondents. In *Sullivan*, various subordinate town officials told Sullivan that his subdivision roads would be accepted if improved in a certain

way. 805 F.2d at 83. However, after Sullivan so improved the roads, the official town body responsible for accepting the roads, declined to do so. Sullivan brought suit.

The Second Circuit held that Sullivan had not stated a cause of action under the due process clause, noting specifically that:

> This is particularly true because it was within Sullivan's power under Connecticut law to convene a town meeting to consider the question of acceptance, without the direct participation of the planning and zoning commission or the board of selectman. All that was needed was the application of 20 qualified voters.

Id. at 84. It would have been far easier than that for petitioner to get a formal decision. He could have simply gone to a County or Village Board meeting and made his request and presented his case. He simply did not do so.

2. There is No Conflict With the Third Circuit

In both *Neiderhiser*, *supra*, and *Bello*, *supra*, the defendant governments had acted finally to deny the requested permits. In each case, those denials were sufficiently final to have been appealed through, and reversed by, the State court system. Both cases arose on pre-trial motions, and the question was not whether there had been a denial, but simply whether the plaintiffs had sufficiently plead that the denial was constitutionally improper. Thus, neither of these Third Circuit decisions contributes anything to an understanding of the Seventh Circuit's opinion, which is based squarely on the fact that there never was even an initial denial of petitioner's request for sewer because petitioner "... failed even to present a formal application to either the Village of Grayslake or Lake County." Pet. 12a.

Suburban Trails, Inc. v. New Jersey Transit Corp., 800 F. 2nd 361 (3d Cir. 1986), is a Third Circuit decision more in point. In that case, based on facts closely analogous to this case, the Third Circuit concluded that neither constitutional nor antitrust claims were ripe for review. There, as here, plaintiff had made preliminary inquiries concerning its eligibility for a grant and had been given preliminary indications that the grant would be

denied. Plaintiff then brought suit. The Third Circuit found the controversy not ripe, stating:

> Although staff members had expressed their disapproval, a formal denial must come from the Board itself. . . . We are thus presented with a situation in which the allocation of buses–the plaintiffs' principal concern–is subject to a decision by N.J. Transit which has not yet been formally made. . . . Until an agency has completed its work by arriving at a definitive decision, judicial review is premature.

Id. at 365. The Seventh Circuit said neither more nor less.

3. There Is No Conflict With the Fourth and Fifth Circuits

Scott, *supra*, and *Suthoff*, *supra*, were decided before *Williamson*. They obviously say nothing about the Fourth and Fifth Circuits' interpretation of *Williamson*. Neither so much as mentions the ripeness doctrine.

The Fourth Circuit did address *Williamson* in *Plakas v. County of Middlesex*, noted 803 F. 2d 714 (4th Cir. 1986) (op. not for pub.; text in Westlaw). In that case, the Fourth Circuit applied the second prong of *Williamson* (failure to pursue a state compensation remedy) to bar as unripe *both* a takings claim and a due process claim. The Seventh Circuit, of course, had no need to reach the second prong of *Williamson*, and there is clearly nothing in its decision of this case that is in conflict with *Plakas*.

4. There Is No Conflict With the Eighth Circuit

In *Mitchell*, *supra*, and *Littlefield*, *supra*, the challenged activity or ordinance had been formally, finally and definitely applied to the plaintiff and there was, therefore, no issue concerning threshold ripeness.

Neither *Williamson* nor ripeness was even mentioned in *Mitchell's* discussion of due process. Plaintiff alleged that its property had been damaged by the building of a county road, obviously a completed action.

The *Littlefield* due process claim was ripe because (1) the

Littlefields had, unlike petitioner here, filed a proper application for a building permit and had "complied with all the *legal* requirements contained in the ordinances of the City of Afton" for issuance of such a permit, 785 F.2d at 602 (original emphasis) and (2) the city council, unlike the respondent governments here, had formally acted on that permit request and had refused to issue the permit unless the Littlefields " 'conveyed... additional public right of way' " to two neighboring property owners. *Id.* at 598-99. Thus, unlike the situation here, the plaintiff had formally and properly applied for a permit, and the initial decisionmaker had arrived at a formal and final position to deny that permit. The presence of those circumstances in that case led the Eighth Circuit to conclude that plaintiff's claim was ripe; the absence of those circumstances in this case led the Seventh Circuit to the opposite conclusion. In this, there is no conflict.[12]

C. There Is No Conflict With the Ninth Circuit

Finally, while conceding that the Ninth Circuit has reached results similar to the Seventh Circuit's decision in this case, *see Kinzli v. City of Santa Cruz*, 818 F. 2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988), and *Herrington v. County of Sonoma*, 834 F. 2d 1488 (9th Cir. 1987), petitioner argues that *Herrington* cannot be reconciled with the Seventh Circuit's decision. Petitioner makes this argument by stringing together unrelated snippets from *Herrington*. Pet., p. 21.

It is especially interesting to note that, in arguing that there is a conflict between this case and *Herrington*, petitioner cites only passages from part A.2 of *Herrington* ("*Ripeness--MacDonald's Reapplication Requirement*"). The Seventh Circuit on the other hand very carefully cited only part A.1 of *Herrington* ("*Ripeness--Kinzli's Final Decision Requirement*"). *See Her-*

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[12]It should be noted that the Eighth Circuit has apparently retreated from its holding in *Littlefield* that the denial of a zoning permit in violation of state law states a federal substantive due process cause of action. *Lemke v. Cass County*, 846 F. 2d 469 (8th Cir. 1987).

rington, supra, 834 F.2d at 1494 and 1497. Thus, despite petitioner's creative cutting and pasting, it is clear that *Herrington* is fully consistent with the Seventh Circuit's opinion concerning the crucial issue in this case–whether petitioner has satisfied the threshold requirement enunciated in *Agins, Williamson* and *MacDonald* by demonstrating that "the initial decisionmaker has arrived at a definitive position":

> "The preliminary question for us is whether the *Kinzli* final decision requirement, derived from the Supreme Court's taking cases, applies to the due process and equal protection claims asserted by the Herringtons. We conclude that the requirement applies. . . ."

Id. at 1494. *See also Kinzli, supra* (abandonment of application prior to a final decision rendered unripe taking, due process and equal protection claims).

Herrington's subsequent discussion of the differences between taking claims and due process claims for purposes of applying the *MacDonald* reapplication requirement is relevant only after the "final decision" threshold has been crossed. In this case, petitioner never crossed that first threshold. There was, therefore, no need for the Seventh Circuit to discuss subtle differences that might be relevant if he had. *Herrington* may raise the question petitioner asks this Court to address. This case clearly does not.

IV. THE SEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT N.O.V. ON PETITIONER'S ANTITRUST CLAIM

A. The Antitrust Claim Was Not Ripe

Although petitioner repeatedly cites *Patrick v. Burget,* 108 S. Ct. 1658 (1988) as though it were a landmark decision on ripeness, Pet., pp. i, 15, 26-27, ripeness was never raised nor even mentioned. Petitioner, however, concludes that because the facts mentioned in *Patrick* reflect that the petitioner there brought suit before the completion of the peer-review proceedings he was challenging, one can imply that a final decision was

unnecessary for ripeness. However, in *Patrick*, plaintiff claimed that the mere existence of the peer review process violated the Sherman Act; he contended that respondents "*initiated* and participated in the hospital peer-review proceedings to reduce competition." *Id.* at 1661 (emphasis added). Petitioner here makes no such claim; his claim is based on the denial of service. Pet. 14a. The Seventh Circuit, therefore, correctly held that because petitioner was not claiming that the mere existence of the Grayslake sewer agreement operated as a restraint of trade, his challenge based on the wrongful application of that agreement was necessarily unripe in the absence of any evidence that it had ever been applied to him. *See Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F. 2d 361, 368 (3d Cir. 1986).

B. Petitioner's Claim Is Barred by the State Action Doctrine

The Seventh Circuit's holding that "the defendants are immune from antitrust liability under the state action doctrine," supported by two pages of analysis in the court's opinion, is clearly correct. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, (1985). It is also clearly an alternative ground of decision and not, as petitioner suggests, merely "dicta." Pet., p.14 n.10. As this Court has consistently held, "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (citations omitted).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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